82-1876

No. ______

IN THE

Supreme Court of the United States

October Term, 1983

FOREMOST PRO COLOR, INC.

Petitioner,

vs.

EASTMAN KODAK COMPANY,

Respondent.

Petition For a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

Whether there is a divergence among the Circuits as to whether the respondent, Eastman Kodak Company ("Kodak") illegally used its monopoly power to control the amateur photographic market;

Whether the lower courts misapplied the law when they held that Kodak's refusal to offer its product technical assistance and prompt delivery of photofinishing equipment to petitioner while offering the services to others, which prevented petitioner from competing with Kodak and others in the market place, was not a violation of Section 2(e) the Robinson-Patman Act, 15 U.S.C. 13(e);

Whether the lower courts misapplied the law when they held that Kodak's refusal to grant petitioner a 12% cash rebate on purchases of its photographic paper, while giving it to others, which prevented petitioner from competing in the market place with Kodak and others, was not a violation of Section 2(a) of the Robinson-Patman Act, 15 U.S.C. 13(a); and

Whether petitioner's third amended complaint alleged the requisite "short and plain statements of the claims showing the pleader is entitled to relief . . ." under *Federal Rules of Civil Procedure 8(a).*[1]

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[1]There were also four contract claims that were summarily disposed of by the district court and affirmed by the Ninth Circuit, which will not be discussed.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Foremost Pro Color, Inc. ("Foremost"), the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the case on February 23, 1983.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit has not been reported, and is set forth herein as Appendix A. The opinion of the United States District Court for the Central District of California has not been reported, and is set forth herein as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on February 23, 1983. This petition for writ of certiorari was timely filed within ninety days therefrom, pursuant to Supreme Court Rule 17.1(a)(c) and 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the following federal statutes, which are set forth verbatim in Appendix C.

1. United States Codes:
   (a) 15 U.S.C. Section 1
   (b) 15 U.S.C. Section 2
   (c) 15 U.S.C. Section 3
   (d) 15 U.S.C. Section 13(a) and (e)
   (e) 15 U.S.C. Section 14
2. Federal Rules of Civil Procedure:
   (a) Rule 8

STATEMENT OF CASE

This is a major antitrust case brought by Foremost against Kodak that claims Kodak used its monopoly power to exclude Foremost and others from competing in the amateur wholesale photofinishing market. Foremost also claims that Kodak used its monopoly power in film to control secondary markets in photographic paper, photographic chemistry, photofinishing equipment and cameras.

Photofinishing — the production of an observable photographic print — entails two successive procedures: "film processing" or "developing" and "printing and print processing." After film is exposed by the taking of pictures, it is transformed into a negative by immersing the film in various chemical solutions. This procedure is known as "film processing." Thereafter, the negative is placed between a light source, which generally is contained in an enlarging printer, and sensitized photographic

paper. The exposure of light through the negative by a photographic lense in the enlarger imprints a latent image onto the sensitized photographic paper that cannot be seen unaided by the human eye. To produce an observable image, the sensitized photographic paper must be immersed in other chemical solutions. This procedure is known as "printing and print processing." Hence, the final product essentially entails nothing more than transferring the characteristics of the negative onto photographic paper, and by developing the latent image through chemical processing into a photographic print. This photographic print is composed of photographic paper and chemistry.

Moreover, all the chemistry, paper, and film used to manufacture photographic prints must be compatible with one another to produce a satisfactory print. The design and manufacture of these sensitized products is a very complex and sophisticated art; to deviate from using compatible products would result in ruining the film or paper used. In addition, the photofinishing equipment[2] used also must be compatible with these sensitized products.

Kodak is one of the giants of American enterprise with sales during the relevant periods of this suit in excess of six billion dollars and pre-tax profits in excess of 1.2 billion dollars.[3]

Kodak is a leading developer and manufacturer of photofinishing equipment, replacement parts, film, cameras, accessories and photographic paper and chemicals in the United States. Because of Kodak's dominant market position in the photographic industry, over 85 percent of all photofinishing done in the United States involves the use of its photofinishing equipment, film, and photographic paper and chemicals. These commodities are manufactured, distributed, and sold by Kodak in interstate commerce to

[2]The term "photofinishing equipment" refers to that photographic equipment, such as film processors, paper processors, color printers, lenses, and other printing and print processing equipment which are used by Kodak, Foremost, and other photofinishers to develop film into negatives, and to print and print-process those negatives into pictures.

[3]As reported in *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 267 (2nd Cir. 1979), *cert. den'd* 444 U.S. 1093 (1980).

authorized Kodak dealers and to independent photofinishing laboratories like Foremost throughout the United States.

Moreover, because Kodak has the largest research and development division of any of the nation's photographic manufacturers, it is in a unique position to offer technical services and information about its photofinishing equipment, film, and photographic paper and chemicals. Kodak also exclusively controls technical services and information about the procedures necessary for the maintenance of its photofinishing equipment, as well as the handling characteristics of, and proper photofinishing procedures for, its film, paper, and chemistry. This information is not available from any other reliable source. Without this information, it is impossible for an independent photofinisher to control its cost of production and quality so as to compete effectively in the wholesale photofinishing trade.

Foremost is one of the last of several thousand family owned and operated independent photofinishers with annual sales during the relevant period of this suit of less than $350,000 and profits before non-cash charges and owners salaries of less than $90,000.[4]

Foremost has been an authorized Kodak dealer and independent photofinisher since 1955. As an authorized Kodak dealer, Foremost has purchased, film, paper, and chemistry directly from Kodak for resale to the public. As an independent photofinisher, Foremost functioned as both a wholesaler and retailer.[5] In so doing, Foremost has purchased paper and chemistry directly from Kodak for resale to retailers and the public, and it has purchased photofinishing equipment directly from Kodak to perform its photofinishing tasks. Consequently, Foremost has a multifacted relationship with Kodak, whereby Kodak is both a competitor of and a supplier to Foremost.

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[4]Computed from Foremost's books and records.

[5]Unitl 1977, Foremost competed with Kodak in wholesale photofinishing, which entailed doing photofinishing work for retail stores who resell that service to the public.

Since 1878, when George Eastman "borrowed"[6] a roll film process to load a camera with film so a photographer could take several pictures without changing film, Kodak has embarked upon a program to monopolize and restrain competition in the amateur photographic industry. Kodak's efforts have continued, despite numerous court orders.

In 1913, for instance, the United States sued Kodak for violation of the Sherman Act. *United States v. Eastman Kodak Co.*, 203 F. 522 (W.D.N.Y. 1916). Kodak was found liable for monopolizing photographic supplies, and the trial court entered a final decree providing that the business of Kodak be dissolved in such a manner as to establish competitive conditions in the photographic industry. It further enjoined Kodak from "continuing or carrying into further effect the monopoly herein adjudged illegal, or any of the contracts, conspiracies, restraints on trade, terms of sale, regulations or practices of any similar acts which might in the future restrain commerce in photographic supplies among the States or induce or prolong an unlawful monopolization of such commerce."

To date, there has not been a dissolution or dissipation of Kodak's unlawful monopoly of photographic supplies. Instead, that original monopoly has become entrenched, and it has been extended into new areas by consciously designed policies and practices. Whenever possible, for instance, Kodak has tied the sale of many of its products in an unreasonable restraint of trade. From 1899 to 1912, Kodak tied the sale of its film and cameras together, as well as the sale of its photographic paper and chemistry.

[6]In *Goodwin Film and Camera Co. v. Eastman Kodak Co.*, 207 Fed. 351 (D.D.C.), it was decided that one Hannibal Goodwin was the inventor, and Goodwin was awarded an accounting and injunctive relief.

From the early 1930's to 1954, Kodak tied the sale of its color prints and slides to the sale of its color film,[7] which resulted in the issuance of a consent decree in 1954. The judgment is reprinted in Appendix D.

Prior to this decree, moreover, Kodak had an absolute monopoly in its color film and color prints. This decree called for the divestiture by Kodak of 50% of its domestic processing facilities within seven years, unless Kodak could show that there were independent photofinishers available for each kind of Kodak film. (Appendix D, Paragraph XII.) The practical impact of this decree was that Kodak had to establish enough independent photofinishers within the United States to be capable of processing 50% of all Kodak color film, or Kodak would have to divest itself of its processing facilities. However, the order did not require the independents to process 50% of all of Kodak's films. It only called for the availability of Kodak's processing equipment to be owned by independants

The decree also called for Kodak to furnish color printing, processing equipment, material, and proper training to any photofinisher that desired to enter the color photofinishing market. Despite the order of the Court, Kodak charged excessive prices for its color equipment, which required an independent photofinisher to triple its investment to start up a color processing line.

The result of the excessive prices charged by Kodak for their color processing equipment was that few independent photofinishers entered the color processing field. In 1960, with less than two years to go on the divestiture order, Kodak did not have enough equipment in place that was owned by independents so to avoid divestiture. To correct this problem, Kodak hired sales persons to sell its equipment to the independents at no money down, and it additionally offered financing to those interested

[7]The United States brought an action against Kodak charging violations of Sections 1, 2, and 3 of the Sherman Act. A consent decree was entered, wherein Kodak was ordered to refrain from tying the color film with any other products. *United States v. Eastman Kodak Co.*, Case No. CV 6450 (W.D.N.Y. 1954). See Appendix D.

independents to allow them to make the large investment possible to enter the color processing market.

The Kodak sales persons projected earnings to the independents to demonstrate that not only could they earn enough to pay for the equipment, but that their profits would be doubled. The problem that developed later was that these projections of earnings were based upon the existing Kodak retail sales price of prints of 37¢ each, with a wholesale sales price of 22.2¢ each. These convincing projections were, of necessity, in Kodak's interest. They resulted in Kodak being able to sell enough processing equipment to satisfy the court order and prevent divestiture.

To protect its lucrative market in processing, and to restrain competition, Kodak thereafter lowered the retail sales price of its color prints to 23¢ by 1962. It is probably no coincidence that this was the projected wholesale price used to induce the independents to enter the color processing field based upon the Kodak representation in earning projection. This resulted in the independents selling their prints for 13.8¢ instead of 22.2¢, and many independent processors either went out of business or were forced to sell their laboratories.

During the 1960's Kodak defied the intent of the 1954 court decree, and in 1963 it introduced cartridge still and movie cameras that tied the sale of Kodak film to the sale of those cameras. This allowed Kodak to increase its share of the market from the range of 61% to 64% of the dollar volume for the period 1954 to 1963 to 90% in 1964.

From 1970 to 1972, Kodak's monopolization continued when it secretly developed that 110 pocket camera, 110 Kodacolor II film, C-41 photographic chemistry, Ektacolor 30/37 photographic paper, and Ektaprint 3 photographic chemistry. All these products were incompatible with any existing products manufactured or sold in the United States, and each one required that a secondary product be purchased to use the original product. Between March 1, 1972, and March 1, 1973, Kodak introduced these new products and discontinued the production and sale of all its products that were compatible with products then manufactured

by their competitors. Overnight, Kodak was able to eliminate competition. As a direct result, Kodak was able to increase its pre-tax profits during the relevant periods of this suit from $791,700,000 in 1970, to $1,203,000,000 in 1973. This was an increase of $411,300,000, or 51.9% of its 1970 profits before taxes. The excess profits earned by Kodak in the years 1971 through 1976 as compared to the base year of 1970 was $1,739,700,000.[8]

In 1972 and 1973 Kodak discontinued its then Kodacolor X film which could be developed anywhere in the World by Kodak and independent processing labs in a chemical solution called C-22. In addition to being able to process Kodak's Kodacolor X film, these independent labs could also process several other types of color film manufactured by other manufacturers such as Fuji, G.A.F. and other companies throughout the World.

Kodak next replaced its Kodacolor X film with Kodacolor II film in all sizes in 1973. Kodacolor II film required processing in a chemical solution called C-41. Any film other than Kodacolor II processed in C-41 chemistry was destroyed. Any Kodacolor II film processed in C-22 chemistry was damaged.

At the time of the introduction of Kodacolor II film and the discontinuance of Kodacolor X film, Kodak had a monopoly on color film and color paper sold and processed in the United States.[9] At this time Kodak film represented 85% of the film being processed in the United States. Therefore, any photofinishing business in the United States was forced to purchase new equipment to process the new Kodacolor II film. The alternative was for that business to lose 85% of its business overnight. When the independent labs in the United States switched to C-41 processing, competition to Kodak was eliminated.

At the same time, Kodak discontinued its then compatible Ektacolor 20 paper and replaced it with Ektacolor 30-37 paper,

[8] Moody's Investor's Fact Sheet, N.Y.S.E., November 30, 1977.

[9] Kodak was held to have monopoly power in the film and color paper market in *Berkey Photo, Inc. v. Eastman Kodak Co., supra*, at 295, 299.

and it discontinued its Ektaprint C chemistry and replaced it with Ektaprint 3 chemistry. The old paper could not be processed in the new chemistry, and the new paper could not be processed in the old chemistry. Thus, Kodak was able to eliminate its competitors in the color paper and color chemistry market as it did in the film market.

During the 1970's Kodak also took retalitory action against independent photofinishers who purchased goods other then Kodak's, and Foremost was one of this group. From 1972 to 1976 Kodak withdrew from Foremost its free services and facilities connected with the purchase of Kodak products while continuing to offer these same services and facilities to other purchasers of Kodak products. In addition, Kodak refused to deliver photofinishing equipment to Foremost, either pursuant to their contracts or according to the delivery schedule afforded other independent photofinishers. Furthermore, from 1972 until November 1977, Kodak refused to offer Foremost a 12½% price reduction on the purchase of color photographic paper while offering it to other purchasers of the same product. Foremost sought to secure these services, facilities and price reductions from Kodak between 1972 and 1976, but to no avail.

Kodak's acts resulted in several suits being filed against it for violation of antitrust laws. In 1973, Berkey Photo, Inc. filed a lawsuit against Kodak[10] for violations of Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act. Many of its charges against Kodak are identical to those pleaded here. The jury found Kodak liable for violations of Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act, and it assessed damages. The trial court also granted injunctive relief, which requires Kodak to treat all photofinishers, including its own processing lab, in an equal manner. On appeal, the United States Court of Appeal for the Second Circuit upheld the jury's finding of monopolization based upon issues identical to this suit, and it

[10] *Berkey Photo, Inc. v. Eastman Kodak Co.*, 457 F. Supp. 404 (S.D.N.Y. 1978).

remanded the case on the issue of damages. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F 2d 263 (2nd Cir. 1979), *cert. den'd* 444 U.S. 1093 (1980).

REASONS FOR GRANTING THE WRIT

1. Certiorari Should be Granted To Resolve Important Conflicts In Decisions Among The Lower Courts.

The issue in this case is whether the Ninth Circuit correctly held that Kodak's use of its monopoly power in one area of the market place to control a secondary market is not a violation of the antitrust laws, while the identical issue was held to be a violation by the Second Circuit in *Berkey Photo Inc. v. Eastman Kodak Co.*, 603 F 2d 263 (2nd Cir. 1979), *cert. den'd* 444 U.S. 1093 (1980), and *G.A.F. Corp. v. Eastman Kodak Co.*, 519 F. Supp. 1203 (S.D.N.Y. 1981).

Throughout these proceedings, the trial court and the appellate court abused their discretion. Every antitrust cause of action in the complaint, for example, contained the requisite "short and plain statements of the claims showing the pleader is entitled to relief . . ." *F. R. Civ. P. 8(a)*. Each claim expressly or impliedly stated all the necessary elements and *notified* Kodak of the charges made against it. Nevertheless, both courts failed to heed the admonitions of *Rule 8* in granting Kodak's dismissal motions.[11]

For instance, Foremost alleged that 85% of the amateur market is controlled by Kodak (App. E ¶41); that Kodak developed a new film called Kodacolor II that was incompatible with existing competitive film products (App. E ¶¶56-59); that to use the new film manufactured by Kodak, a purchaser would have to purchase products in a secondary market manufactured by Kodak that were unavailable from any other source. These products were C-41 chemistry, Ektacolor 37 paper, Ektaprint 3 chemistry and

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[11]For instance, *Rule 8(e)* only mandates that "each averment of a pleading . . . be simple, concise and direct. No technical forms of pleadings or motions are required." *F.R. Civ. P. 8(e)*. And *Rule 8(f)* requires that "[a] pleading shall be so construed as to do substantial justice." *F.R. Civ. P. 8(f)*.

new photofinishing equipment (App. E ¶¶68-70). Foremost also alleged that Kodak developed and introduced these new products so as to charge 10% to 40% more for its products (App. E ¶70) and that Kodak developed these products in an attempt to monopolize the market so to secure the power to control prices and to exclude competition (App. E ¶¶70, 72, 74, 75, 76).

The Second Circuit, based upon similar allegations, found that a violation of Section 2 did occur when Kodak used its monopoly power in film to control the secondary markets of photographic papers, chemistry, and photofinishing equipment. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F 2d 263, 275, 276, 279, 284, 292, 293, 295, 299 (2nd Cir. 1979), *cert. den'd*, 444 U.S. 1093 (1980). Furthermore, in another case, Kodak was collaterally estopped from denying its liability on Section 2 violations, and summary judgment was granted against it on this issue based upon the *Berkey* case. *G.A.F. Corp. v. Eastman Kodak Co.*, 519 F. Supp. 1203, 1216 (S.D.N.Y. 1981).

Indeed, when Kodak moved for summary judgment on the issue of whether its discontinuance of C-22 film processing procedures and change to their C-41 processing procedures, which required the purchase of new chemistry and equipment, was a violation of Section 2, the *G.A.F.* court, *id.* at 1229, denied the motion and held that "Genuine issues of material fact exist as to whether Kodak coerced photofinishers to convert to the C-41 process, thereby reducing the availability of C-22 processing and causing consumers to purchase and use C-41 compatible film. Further, a factual issue exists as to whether Kodak's withdrawal of Kodacolor X and its replacement with Kodacolor II in 126 and 135 formats, by itself or in connection with its alleged conduct, was a coercing use of Kodak's monopoly power."

These identical issues, among others, were presented in the Foremost complaint against Kodak. Instead of resolving the issues on their merits, the Ninth Circuit sidestepped them by stating that Foremost failed to state a claim upon which relief could be granted, and it affirmed the lower court's ruling. (App. A at 1, 6, 7, 22.)

In affirming the dismissal of the Section 1 and Section 3 tying claims, the Ninth Circuit admitted that: "Foremost's third amended complaint alleged that because the new Kodacolor II film . . . was not compatible with any of the then existing film processing procedures or chemical solutions," and because the new "chemistry was not compatible with the then existing . . . paper, [Foremost] was required to discard its complete inventory of old paper and chemistry and purchase the new . . . papers and . . . chemistry." Foremost alleged that this amounted to the sale of commodities "on an implied contract, condition, agreement, or understanding that [Foremost] would purchase other photographic commodities manufactured and sold by [Kodak]. As Foremost has phrased it on appeal, this implied condition, agreement or understanding arose because whenever Foremost purchased on Kodak product, it *necessarily had to purchase additional Kodak commodities* (emphasis on original." App. A at 7.

However, the Ninth Circuit held that because Foremost did not allege that Kodak required the purchase of the secondary product as a condition of sale of the first product, no violation could occur. (App. A at 10) In doing so, the court refused to recognize the rule of reason entailed in the case. This was that Kodak did not have to make the purchase of the tied product conditioned on the purchase of the other products sold because either product was useless without the purchase of both products. Therefore, no one would buy Kodacolor II film or Ektacolor 30 paper unless the film and paper could be processed. If processing the film and paper of necessity required the purchase of new equipment and chemistry, the very nature of the sale of the film and paper entailed the purchase of the secondary products.

In reviewing the Section 2 claims, the Ninth Circuit once again recognized that the Foremost complaint alleged that Kodak developed these new products in such a manner as to monopolize and control the amateur photographic market. (App. A at 12, 13) However, because these claims were held to be insufficient to establish illegal tying arrangements, the court held as a matter of law that the tying allegations were insufficient to aver the requisite

willful acquisition or maintenance element of a monopolization claim. (App. A, *id*. at 14.)

Thus, the Ninth Circuit's holdings are directly opposite to the Second Circuit, which held that such manipulation of the market by Kodak was in fact actionable causes of action.

2. The Lower Courts Misapplied 15 U.S.C. 13(e), Which Involves Discrimination In Services and Facilities.

The Ninth Circuit, in summarily dismissing Foremost's allegations pertaining to this claim, effectively is rewriting Section 2(e) of the Robinson-Patman Act.

Foremost alleged in its sixth claim for relief that it purchased commodities from Kodak (film, chemistry and color paper) and that Kodak refused to offer to Foremost services and facilities connected with the resale of these commodities. Foremost also alleged that it resold these products in competition with Kodak and others; that Kodak had exclusive control over the technical services and information concerning the new film, paper, and chemistry; that Kodak offered free technical assistance to other purchasers of Kodak film, paper, and chemistry; and that it refused to offer the same service to Foremost. In addition to the technical assistance, Foremost alleged that Kodak delivered printing equipment necessary to print the film and paper to all other purchasers of the film, paper, and chemistry, but that Kodak refused to offer the same sixty day delivery service to Foremost. Foremost further pleaded that Kodak's refusal to offer the above services and facilities drove Foremost out of the wholesale photofinishing market. (App. E at ¶¶41-54.)

The commodities for resale encompassed within the Section 2(e) pleadings are the film, paper, and chemistry. The services involved in the acts of discrimination to trigger the 2(e) violations was the free technical assistance Kodak offered other purchasers, while refusing to do so for Foremost. The facilities involved in the acts of discrimination are the printing equipment. Both of the

above are connected with, and are an important part of, the resale of the Kodak film, paper, and chemistry.

The Ninth Circuit concedes that these allegations were made. (App. A at 18.) However, it ruled that since Foremost did not allege that the discriminated services or facilities delivery schedules and technical assistance) were resold by Foremost, the 2(e) claims must fail as a matter of law. (App. A at 19, 20.) This is not the law, nor can it be. The very nature of Section 2(e) prohibits this rationale, for the discrimination must be *connected with* the resale of the commodity, not the resale of the commodity itself.

The cases dealing with Section 2(e) also demonstrate the fallacy of this ruling. This Court has never held that there must be a resale of the discriminated services to state an action under Section 2(e). In fact, the cases decided by this Court holding violations without the reselling of the discriminated services are legend. *See, e.g., FTC v. Fred Meyer, Inc.*, 390 U.S. 341 (1968) (sales coupons); *FTC v. Simplicity Pattern Co.*, 360 U.S. 55 (1959) (sales catalogues, free transportation and storage cabinets); *Corn Products Refining Co. v. FTC*, 324 U.S. 726 (1945) (advertising allowances). The above are the leading 2(e) cases that have been decided by this Court, and in each instance, there was no incident of reselling the discriminated service or facility.

With the exception of the Ninth Circuit, the lower courts have followed the dictates of this Court: *Elizabeth Arden, Inc. v. FTC*, 156 F 2d 132 (2nd Cir. 1946), *cert. den'd* 331 U.S. 806 (1947) (supplying sales personnel to selected customers); *North American Phillips Co. v. FTC*, 55 FTC 682 (1958) (furnishing "missionary men" for on-the-job training to selected customers); *Ben B. Schwartz & Sons v. Sunkist Growers, Inc.*, 203 F. Supp. 92 (E.D. Mich 1962) (furnishing warehousing services); *Centex-Winston Corp. v. Edward Hines Lumber Co.*, 447 F 2d 585 (7th Cir. 1971), *rev'd and rem'd* 1971 CCH Trade Cases ¶73, 530 (N.D. Ill. 1970), *cert. den'd* 405 U.S. 921 (1972) (refusal to offer delivery services on an equal basis); *FTC v. Exquisite Form Brassiere, Inc.*, 301 F 2d 499 (D.D.C. 1961) (furnishing its employees to select customers to train store personnel how to fit and display brassieres.

In holding that as a matter of law the discriminated services or facilities must be resold, the Ninth Circuit did not follow the law, the decisions of its sister courts, or the decisions of this Court.

3. The Lower Courts Misapplied 15 U.S.C. 13(a), Which Involves Discrimination In Price.

Foremost alleged in its complaint that it purchased photographic paper from Kodak from 1972 until the date of the filing of the complaint; that during this period, it purchased over $250,000.00 in photographic paper and chemistry; and that Foremost was in direct competiton in the resale of these commodities with Kodak and other purchasers of Kodak's commodities. (App. E at ¶¶43, 44, 77.)

Foremost further alleged that from 1972 until the date of the filing of the complaint, Kodak gave a 12% price reduction to other purchasers of Kodak photographic paper who were in competition with Foremost for the resale of the commodities (photographic paper) involved in the price reduction. (App. E at ¶¶77, 78, 79.) Foremost further pleaded that the alleged discrimination caused competition by Foremost to be lessened, restrained, or eliminated. (App. E at ¶82.)

Despite the above, the Ninth Circuit summarily disposed of the complaint based upon Foremost's failure to specifically state that competition had been lessened or could be lessened. (App. A at 22.) In so doing, it appears that the Ninth Circuit failed to restrict its decision to the pleadings.

CONCLUSION

In dealing with the Section 2 violations, Foremost has pleaded in its complaint that since World War II Kodak has used its monopoly power to control all phases of the amateur photographic market; that its unlawful actions have allowed Kodak to secure power to control prices and foreclose actual and potential competition in the market; and that such action has eliminated many of the independent photofinishers within the United States. [App. E at ¶¶72,74, 75, 76(a) (b) (c) (2)].

Foremost is one of the last of the family-owned, independently operated photofinishing businesses in the United States. Many of Foremost's peers have already fallen, and unless Kodak is held actionable by its illegal actions, there will be no small independents left to compete with the giant Kodak.

The Foremost action is based upon the very principle the Sherman, Clayton, and Robinson-Patman Acts were designed to protect, *i.e.* the small business from the giants of industry. From that standpoint, this case is right on point with the intent of the antitrust laws. Foremost's assets total less than $200,000.00, and in this regard, as compared to Kodak, it is an insignificant part of the American industrial complex. It may be for this reason that the lower courts gave little or no credence to the Foremost pleadings. However, Foremost and others similarly situated have been, and will be, a significant part of the amateur photographic industry if they are allowed to compete without Kodak's illegal use of its monopoly power.

This may be the last opportunity for this Court to offer protection to the small independent photofinishing business within the United States. If this case cannot be heard on its merits, it well could toll the future of all small photofinishing businesses. For if Kodak is allowed to pick and choose its competitors, eliminating those who displease it, other large enterprises can exercise the same illegal control.

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

LAW OFFICES OF ROBERT C. FORTUNE

DATED: April 25, 1983 William T. Pillsbury for
Robert C. Fortune

Law Offices of Robert C. Fortune
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Foremost Pro Color, Inc.

APPENDIX A

United States Court of Appeals

FOR THE NINTH CIRCUIT

FOREMOST PRO COLOR, INC., a California corporation, individually and on behalf of all other similarly situated, *Plaintiff-Appellant,* vs. EASTMAN KODAK COMPANY, a New Jersey corporation, *Defendant-Appellee.*	**No. 80-5629** **D.C. No. CV 76-720-FW** **OPINION**

Appeal from the United States District Court for the Central District of California Francis C. Whelan, District Judge, Presiding Argued and Submitted June 8, 1982

Before: GOODWIN, WALLACE, and PREGERSON, Circuit Judges.

WALLACE, Circuit Judge:

Foremost Pro Color, Inc. (Foremost) appeals from the district court's judgment for Eastman Kodak Co. (Kodak). The district court dismissed Foremost's antitrust claims for failure to state a claim upon which relief could be granted. The court then granted Kodak's motion for summary judgment on four of Foremost's five breach of contract claims. After Foremost voluntarily dismissed the remaining contract claim, the district court entered final judgment for Kodak. We affirm.

I

Kodak is the preeminent firm in the amateur photographic industry in this country, enjoying a dominant position in the markets for photographic film and conventional amateur still cameras. For example, over eighty percent of all photofinishing — the development of negatives and the printing of photographs — is conducted with Kodak-manufactured photofinishing equipment, photographic paper and chemicals.

Foremost is an authorized Kodak dealer and an independent photofinisher. As a dealer, Foremost has purchased photographic film, paper and chemicals from Kodak for resale to consumers. As a photofinisher, Foremost has purchased photographic equipment, paper and chemicals from Kodak and used them in the photofinishing process on orders placed by its consumer customers. Because Kodak is also a photofinisher, although at a significantly smaller level than in the past as a result of a 1954 consent decree negotiated with the United States Department of Justice, Foremost is both a photofinisher customer and competitor of Kodak.

Kodak's dominance of the photographic film and amateur still camera markets "is no doubt due to the firm's history of innovation." *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F. 2d 263, 269 (2d Cir. 1979), *cert. denied*, 444 U.S.1093 (1980) (*Berkey*). It is one of those innovations which ignited the present controversy. Similar to *Berkey*, this case arises out of Kodak's undisclosed development and 1972 introduction of its then-newest line of cameras, the 110 "pocket instamatic," and its supporting photographic system. That system included a new generation of film (Kodacolor II), photographic paper, and photographic film processing and printing chemicals. The relevant history of the development and introduction of this system is well-outlined in *Berkey*. *Id.* at 276-78.

Foremost argues that this introduction of a new, integrated photographic system violated several provisions of the antitrust laws. First, it contends that the introduction constituted monopolization and attempted monopolization of the "amateur photo-

graphic market" in the United States in violation of section 2 of the Sherman Act, 15 U.S.C. §2. Second, Foremost claims that because the 110 cameras could only use new Kodacolor II film and because this film could only be processed with the new papers and chemicals, Kodak implicitly and unlawfully tied the sale of cameras to film, film to chemicals, and chemicals to paper and film in violation of section 1 of the Sherman Act, 15 U.S.C. §1, and section 3 of the Clayton Act, 15 U.S.C. §14. Finally, Foremost maintains that Kodak discriminated against it in the supplying of technical photographic assistance and in the timeliness of deliveries, in violation of section 2(e) of the Robinson-Patman Act amendments to the Clayton Act, 15 U.S.C. §13(e), and discriminated against it in prices and credit terms in violation of section 2(a) of the same statute, 15 U.S.C. §13(a).

Although the facts of Foremost's contract claims are more complex, the legal issues they raise are easily analyzed. The jurisdiction of the district court over these state law claims rested upon diversity of citizenship. We give substantial deference to the construction of state law by a district judge sitting in that state and will reverse only if the district judge's interpretation of state law is clearly wrong. *See, e.g., Begay v. Kerr-McGee Corp.*, 682 F.2d 1311 (9th Cir. 1982). We turn first to the entry of summary judgment on the breach of contract claims.

II

Foremost's first contract claim was voluntarily dismissed and is not before us. Its second contract claim alleged that in August 1972, more than three years prior to the commencement of this action, Kodak breached a contract to "assist and supervise" Foremost's efforts to convert its photofinishing operations to utilize the new Kodak chemicals and paper required to develop film from the 110 instamatic camera. The district court granted summary judgment for Kodak on this claim, concluding that (1) the undisputed facts demonstrated that Kodak had not breached the alleged contract, and (2) in the absence of a written agreement, Foremost's claim was barred by California's two-year statute of

limitations for actions based on non-sales, oral contracts. Cal. Civ. Proc. Code §339 (West 1982).

We need not decide whether the district court ruled correctly on the issue of breach because we affirm on the alternative statute of limitations ground. Foremost argued to the district court, and on appeal, that the alleged contract underlying this claim was an August 1, 1972 letter from Kodak. Actually it ws a newsletter from Kauffman, Kodak's Manager for Professional and Finishing Markets, announcing the development of the new chemicals and papers to the photofinishing trade. However, Fortune, the president of Foremost, testified that this letter was not the written contract pleaded in Foremost's complaint and that a similar document, the author of which he could not recall, was the contract pleaded. Foremost never produced this alleged written contract. Thus, the district court was not clearly wrong in granting summary judgment for Kodak on this claim pursuant to California's two-year statute of limitations for breach of contract claims "not founded upon an instrument in writing." Cal. Civ. Proc. Code §339.

Foremost argues that it had a "unilateral" or "implied" contract with Kodak for technical assistance, based upon Kodak's consistent offers of technical assistance to it and other photofinishers, to which the four-year limitations period of Cal. Comm. Code §2725 (West Supp. 1982) applies. Even assuming that Kodak's conduct was sufficient to support such an implied contract, however, there remained no material question of fact. Section 2725 applies only to contracts for the sale of goods. *See id.* §2725(1) (four-year limit for "any contract for sale"); *Id.* §2106(1) (defining "contract for sale"). The contract alleged and testified to by Foremost was a contract to provide "assistance and supervision" for Foremost's conversion of older equipment purchased from another manufacturer. Therefore, the alleged contract in no way involved the sale of goods by Kodak.

Foremost's third and fourth contract claims alleged that Kodak's untimely delivery of certain photofinishing equipment ordered by Foremost breached two written contracts. The undis-

puted facts show that the alleged contracts upon which Foremost relies in both instances are purchase order forms submitted by Foremost to Kodak through the latter's sales representatives, that only one could be located by the parties and it specified no delivery date, and that such order forms specifically state that all orders are "subject to acceptance" by Kodak. The district court concluded that there was no contract underlying either claim because the purchase orders were merely offers to buy, inviting Kodak's acceptance either by a prompt promise to ship or by prompt or current shipment under Cal. Comm. Code §2206(1)(b) (West 1964).

The district court was not clearly wrong in this application of section 2206(1)(b). The weight of authority is that purchase orders such as those at issue here are not enforceable contracts until they are accepted by the seller. *See* Restatement (Second) of Contracts §26 comment d (1981); 1 Corbin on Contracts §24, at 73-74 (1963); *Zinni v. Royal Lincoln-Mercury, Inc.*, 84 Ill. App. 3d 1093, 406 N.E.2d 212 (1980). Foremost has cited no California cases to the contrary. Since there was no promise to ship by Kodak, no contracts were formed until Kodak shipped the merchandise ordered, Cal. Comm. Code §2206(1)(b), and, therefore, there could be no late delivery. Foremost's argument that Kodak somehow promised to ship the merchandise by logging the purchase orders as "received" is without merit; this alone did not manifest Kodak's acceptance of Foremost's offer of purchase. *See* Restatement (Second) of Contracts §19(2) (1981).

Foremost also argues that Cal. Comm. Code §2204(1) (West 1964) applies to these claims, as there was "conduct by both parties which recognizes the existence of such a contract." While it is true that section 2204(1) permits a court to find an enforceable contract in the absence of a written agreement, the agreement-making conduct identified by Foremost is that "the equipment was actually shipped and sold by Kodak." If this statute applied, there could be no contracts formed until Kodak shipped the merchandise. Obviously, Foremost could have no claim for late delivery based upon a failure to deliver the goods before the contracts were formed.

Foremost's fifth and last contract claim alleged that Kodak breached a May 1, 1973 written agreement in which it promised to advise and assist Foremost in converting its photofinishing facilities to permit it to process the new 110 Kodacolor II film. The contract Foremost produced was an "information circular" distributed by Kauffman to the photofinishing trade. The district court granted summary judgment for Kodak on the ground, among others, that this claim wa barred by California's two-year statute of limitations for actions based on non-sales, oral contracts. Cal. Civ. Proc. Code §339 (West 1982). We agree. Trade circulars, catalogs and advertisements are uniformly regarded as mere preliminary invitations which create no power of acceptance in the recipient. *See, e.g.*, 1 Corbin on Contracts, *supra*, §28; *Lonergan v. Scolnick*, 129 Cal. App. 2d 179, 182, 276 P.2d 8 (1944). Based upon this settled law, the district court correctly concluded that there remained no material question of fact as to whether the alleged agreement had been embodied in a written contract. As there was no written contract in this claim, it is barred by the two-year statute of limitations for oral contracts.

III

The district court dismissed Foremost's antitrust claims for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). In reviewing this dismissal, we must accept as true all the well-pleaded allegations of the complaint and can affirm only if it appears with certainty that Foremost would not be entitled to relief under any set of facts which might be proved in support of its claims. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Jabson v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir. 1980). The dismissal is a ruling on a question of law and is therefore freely reviewable on appeal. *Halet v. Wend Investment Co.*, 672 F.2d 1305, 1309 (9th Cir. 1982).

Foremost's seventh claim alleged that Kodak unlawfully tied the sale of the several distinct components of the 110 system in violation of section 1 of the Sherman Act and section 3 of the Clayton Act, and its eighth claim alleged monopolization and

attempted monopolization in violation of section 2 of the Sherman Act. We turn first to the charges of tying.

A.

Foremost's third amended complaint[1] alleged that because "the new Kodacolor II film . . . was not compatible with any of the then existing film processing procedures or chemical solutions," and because the new "chemistry was not compatible with the then existing . . . paper, [Foremost] was required to discard its complete inventory of the old paper and chemistry and purchase the new . . . papers and . . . chemistry." Foremost alleged that this amounted to the sale of commodities "on an implied contract, condition, agreement or understanding that [Foremost] would purchase other photographic commodities manufactured and sold by [Kodak]." As Foremost has phrased it on appeal, this implied condition, agreement or understanding arose because "whenever Foremost purchased one Kodak product, it *necessarily had to purchase additional Kodak commodities*" (emphasis in original).

Tying arrangements have long long been considered *per se* unlawful under section 1 of the Sherman Act. *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958). A tying arrangement is an agreement by a party to sell one product only on the condition that the buyer also purchase a different or "tied" product. *Id.*; *Yentsch v. Texaco, Inc.*, 630 F.2d 46, 56 (2d Cir.

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[1]The original complaint alleged five contract and three antitrust claims. One antitrust claim was dismissed voluntarily, and the remaining two were dismissed for failure to state claims for relief. The first amended complaint realleged the two antitrust claims previously dismissed, added three new ones, and realleged all five contract claims. Pursuant to Fed. R. Civ. P. 12(b)(6), the district court dismissed all the antitrust claims, with leave to amend, and thus did not rule on Kodak's alternative motion for summary judgment on the antitrust claims. The same process was repeated in the second and third amended complaints, although the third amended complaint contained only four antitrust claims and the contract claims. After the district court dismissed the antitrust claims, Foremost attempted to appeal the order of dismissal without complying with the requirements of Fed. R. Civ. P. 54(b). We dismissed that appeal for lack of jurisdiction. The jurisdictional defect was cured when, after summary judgment on the contract claims, Foremost dismissed its last remaining contract claim, the district court entered judgment for Kodak, and Foremost filed a timely notice of appeal.

1980). In order to establish an unlawful tying arrangement,[2] a plaintiff must demonstrate the existence of two distinct products or services, that the sale of the "tying" product or service is conditioned on the purchase of the "tied" product or service, that the defendent has "sufficient economic power" in the market for the tying product to appreciably restrain competition in the market for the tied product, and that the amount of commerce involved in the market for the tied product is "not insubstantial." *Portland Retail Druggists Association v. Kaiser Foundation Health Plan*, 662 F.2d 641, 648 (9th Cir. 1981); *Community Builders, Inc. v. City of Phoenix*, 652 F.2d 823, 830 (9th Cir. 1981); *Moore v. Jas. H. Matthews & Co.*, 550 F.2d 1207, 1212 (9th Cir. 1977). A significant element of an illegal tying arrangement is coercion by the seller, i.e., the seller must condition the sale of the tying product on the buyer's purchase of the tied product. *See Northern Pacific Railway Co. v. United States*, *supra*, 356 U.S. at 5-6, 10; *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 605 (1953); L. Sullivan, *Handbook of the Law of Antitrust* 431 (1977). If the buyer is free to take either product by itself, "there is no tying problem." *Northern Pacific Railway Co. v. United States*, *supra*, 356 U.S. at 6 n.4. "Some modicum" of involuntariness or coercion is thus essential to the existence of a *per se* illegal tie-in. *See, e.g., Betaseed, Inc. v. U and I Inc.*, 681 F.2d 1203, 1215 (9th Cir. 1982); *Hirsh v. Martindale-Hubbell, Inc.*, 674 F.2d 1343, 1347 (9th Cir. 1982); *Sobrato v. Prudential Insurance Co. of America*, 632 F.2d 786, 787 (9th Cir. 1980).

When these prerequisites are met, tying arrangements are illegal in and of themselves, without any requirement that the plaintiff make a showing of unreasonable competitive effect. *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 498 (1969). The principal evil of the tying arrangement, that which has traditionally justified its inclusion in the *per se* categ-

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[2]The slight differences between the elements of a tying violation under section 1 of the Sherman Act and section 3 of the Clayton Act, *see Moore v. Jas. H. Matthews & Co.*, 550 F.2d 1207, 1214 (9th Cir. 1977), are not relevant to this case. The rule stated in the text, however, applies to section 3 only if both the tying and tied items are "commodities." 15 U.S.C. § 14. They are in this case.

ory, is that it denies competitors access to the market for the tied product not because the party imposing the arrangement necessarily has a superior product in that market, but rather because of the leverage exerted as a result of its economic power in the market for the tying product and the demand for the tying product.[3] *See Kentucky Fried Chicken Corp. v. Diversified Packaging Corp.*, 549 F.2d 368, 375 (5th Cir. 1977); *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43, 47 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972). Thus, competition in the market for the tied product is severely restrained because competitors "cannot offer their products on an equal basis" with the party imposing the tying arrangement. *Moore v. Jas. H. Matthews & Co., supra*, 550 F.2d at 1212.

Of course, conduct which does not meet the requirements of the *per se* prohibition against tying arrangements may still constitute a violation of section 1 of the Sherman Act under the "rule of reason" test. *Fortner Enterprises, Inc. v. United States Steel Corp., supra*, 394 U.S. at 499-500; *Phonetele, Inc. v. American Telephone & Telegraph Co.*, 664 F.2d 716, 738 (9th Cir. 1981). But Foremost has not challenged the alleged tying arrangement under the rule of reason. Thus, the dispositive question before us is whether, under the *per se* rule, Foremost adequately pleaded the requisite coercion in its complaint.

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[3]Other justifications of the *per se* prohibition have been suggested. *See Hirsh v. Martindale-Hubbell, Inc.*, 674 F.2d 1343, 1348-49 (9th Cir. 1982); *Moore v. Jas H. Matthews & Co., supra*, 550 F.2d at 1212-13. However, despite the fact that some commentators and economists have criticized the leverage justification mentioned in the text, *see* R. Bork, *The Antitrust Paradox* 373 (1978), it is that theory on which the Supreme Court has consistently justified the *per se* tying rule from *Northern Pacific* to *Fortner*. While commentators may certainly assist courts in developing legal standards to implement the antitrust laws, *see William, Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1061-63 (9th Cir. 1981) (Wallace, J., dissenting from denial of rehearing en banc), as of now the Supreme Court has foreclosed our developing new theories by teaching that "[t]here is general agreement . . . that the fundamental restraint against which the tying proscription is meant to guard is the use of power over one product to attain power over another, or otherwise to distort freedom of trade and competition in the second product." *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 512 (1969) (White, J., dissenting); *see id.* at 498-99 (majority opinion), *quoting Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5-6 (1958); *see also United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610, 617-18 & n.8 (1977).

Although the complaint boldly asserts that the purchase of the tied products was "required," that single word is insufficient to support even an inference of the necessary coercion. *See Sargent-Welch Scientific Co. v. Ventron Corp.*, 567 F.2d 701, 708-09 (7th Cir. 1977), *cert. denied*, 439 U.S. 822 (1978). Foremost did not allege that there existed an express requirement to purchase the 110 components as a package, that Kodak threatened to terminate film sales if Foremost did not also purchase paper and chemicals, or that a condition of being an authorized dealer of 110 cameras was the purchase of 110 film, paper and chemicals. Rather, as the complaint itself explains, the reason Foremost insists that it was required to purchase new film, chemicals and paper was that the newly introduced 110 film could not be processed with the then existing technology and these new products were necessary to satisfy consumer demand for 110 products and to process 110 photofinishing orders placed by its customers. Thus, Foremost's complaint pointedly refrains from alleging that Kodak itself required the purchase of film as a *condition* of the sale of cameras, or required the purchase of chemicals and paper as a *condition* of the sale of film. Coercion for purposes of the *per se* rule means "a product sold on the condition that the buyer also purchase a different or tied product or at least that the buyer agrees not to purchase the product from any other supplier." *Betaseed, Inc. v. U and I Inc., supra*, 681 F.2d at 1222 n.35. In the absence of an allegation that the purchase of the alleged tied products was required as a condition of sale of the alleged tying products, rather than as a prerequisite to practical and effective use of the tying products, Foremost's complaint failed to plead the coercion essential to a *per se* unlawful tying arrangement.[4]

Although liberally sprinkled with the word "required,"

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[4]Under the facts alleged in the complaint, there could not as a matter of law be the sort of implicit coercion discussed in *Moore v. Jas. H. Matthews & Co., supra*, 550 F.2d at 1217, because Foremost was not forced to "accept the tied item and forego possibly desirable substitutes." Since the complaint alleges that, when the 110 system was introduced, no competing manufacturers produced chemicals and papers compatible with Kodacolor II film, there could have been no substitutes that Foremost or other photofinishing customers were foreclosed from purchasing.

Foremost's tying allegation basically involves the so-called technological tie. In other words, because the new film could not be processed with the old chemicals, and because the needed new photographic paper similarly could not be processed with the old chemicals, it was necessary to purchase an entire package of film, chemicals and paper. We do not believe that, standing alone, such technological interrelationship among complementary products is sufficient to establish the coercion essential to a *per se* unlawful tying arrangement. Indeed, such a rule could become a roadblock to the competition vital for an ever expanding and improving economy. Product innovation, particularly in such technologically advancing industries as the photographic industry, is in many cases the essence of competitive conduct. Therefore, we decline to place such technological ties in the category of economic restrictions deemed *per se* unlawful by *Northern Pacific* and its progeny. *See Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49-51 & 50 n.16 (1977); *Betaseed, Inc. v. U and I Inc., supra*, 681 F.2d at 1215.

Nor are the allegations that the new 110 film, chemicals and paper were incompatible with the products offered by Kodak's competitors sufficient to support a *per se* unlawful tie-in. Quite obviously, a firm that pioneers new technology will often introduce the first of a new product type along with related, ancillary products that can only be utilized effectively with the newly developed technology. Until other, less technologically advanced competitors procure licenses or otherwise develop ancillary products that are compatible with the new product, the technological leader will be faced with no present competition in the newly developed product market. The essence of a *per se* unlawful tying arrangement, however, is that it *forecloses* competition in the market for the tied product or products. The creation of technological incompatibilities, without more, does not foreclose competition; rather, it increases competition by providing consumers with a choice among differing technologies, advanced and standard, and by providing competing manufacturers the incentive to enter the new product market by developing similar products of advanced technology. Any short-run absence of competition in the

market for the technologically tied product could just as likely be due to the unwillingness or inability of competitors to devote sufficient economic resources to match the pace of technological development set by the industry's leader, as to the abuse of market power by that dominant firm. Thus, the *per se* rule does not logically fit and should not be applied. It is clear that a mere technological tie does not present the competitive evils which the *per se* prohibition of tying arrangements is designed to prevent. *See Kentucky Fried Chicken Corp. v. Diversified Packaging Corp., supra*, 549 F.2d at 378-79.

As a general rule, therefore, we hold that the development and introduction of a system of technologically interrelated products is not sufficient alone to establish a *per se* unlawful tying arrangement even if the new products are incompatible with the products then offered by the competition and effective use of any one of the new products necessitates purchase of some or all of the others. Any other conclusion would unjustifiably deter the development and introduction of those new technologies so essential to the continued progress of our economy.

Foremost's tying claim alleged only the introduction of technologically related components incompatible with existing products offered by the competition. It did not allege that the dominant purpose motivating Kodak's design and introduction of the 110 system was to compel purchase of the entire system as a package, rather than to achieve the legitimate goal of marketing new, technologically superior products designed to satisfy consumer demand for smaller, pocket-sized cameras. Therefore, the complaint failed to state a claim for relief predicated on unlawful tying.

B.

Foremost incorporated its tying allegations into its eighth claim, which charges monopolization and attempted monopolization in violation of section 2 of the Sherman Act. In this claim, Foremost's complaint alleged that Kodak's dominance of the "amateur photographic market" was the result of its "continually

researching and developing new photographic products," that by introducing new products Kodak would "render[ ] obsolete existing competitive products, and . . . "regain[ ] . . . the dominant share of the amateur photographic market," and that Kodak "perpetrated certain acts" in the course of its monopolization and attempt to monopolize, including developing new products "that are incompatible with then existing photographic products and photofinishing equipment[,] . . . withholding . . . new . . . products . . . from the amateur photographic market until competition . . . force[d] the introduction of these products[,] . . . [and] developing and marketing its 110 [system] in such a manner that [Foremost] was required to purchase new paper, chemistry and photofinishing equipment to enable it to photofinish 110 size film and Kodacolor II film." Foremost also alleged that, as an "effect" of the violations asserted, Kodak "has obtained the dominant share of the amateur photographic market . . . [and] has secured the power to control prices and to exclude . . . actual and potential competition" in that market. We discuss first the tying allegations.

Because the conduct Foremost alleged in support of its section-1 tying claim is not anticompetitive, it is of no assistance to Foremost's efforts to state a claim for relief for monopolization or attempted monopolization, both of which require at least some allegation of anticompetitive conduct. For example, to state a claim for relief for monopolization, the plaintiff must allege (1) the possession of monopoly power in the relevant market, (2) the "willful acquisition or maintenance" of that power, and (3) causal antitrust injury. *E.g., Forro Precision, Inc. v. IBM Corp.*, 673 F.2d 1045, 1058 (9th Cir. 1982). It is the second element, the conduct element, which distinguishes lawful possession of monopoly power from unlawful possession of monopoly power. Section 2 of the Sherman Act proscribes "monopolization"; it does not render unlawful all monopolies. Therefore, we have recently reemphasized that for purposes of a monopolization claim, "willful acquisition or maintenance [of monopoly power] means that the monopolist must have engaged in "willful" acts directed at establishing or retaining its monopoly, "as distin-

guished from growth or development as a consequence of a superior product, business acumen, or historic accident.'' ' '' *Phonetele, Inc. v. American Telephone & Telegraph Co., supra*, 664 F.2d at 739-40.

Similarly, in order to state a claim for attempted monopolization under section 2, a plaintiff must allege (1) specific intent to control prices or destroy competition in the relevant market, (2) predatory or anticompetitive conduct directed to accomplishing the unlawful purpose, and (3) a dangerous probability of success. *Janich Brothers, Inc. v. American Distilling Co.*, 570 F.2d 848, 853 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978); *Ernest W. Hahn, Inc. v. Codding*, 615 F.2d 830, 845 (9th Cir. 1980); *California Computer Products, Inc. v. IBM Corp.*, 613 F.2d 727, 736 (9th Cir. 1979). In this circuit, both the requisite specific intent and dangerous probability of success may, in appropriate cases, be inferred from the existence of predatory or anticompetitive conduct. *Janich Brothers, Inc. v. American Distilling Co., supra*, 570 F.2d at 853-54. However, specific intent to monopolize, and hence an inference of dangerous probability of success, cannot be inferred from conduct alone unless that conduct is predatory or anticompetitive and forms the basis for a substantial claim of restraint of trade. *See Janich Brothers, Inc. v. American Distilling Co., supra*, 570 F.2d at 857; *Greyhound Computer Corp. v. IBM Corp.*, 559 F.2d 488, 505 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978).

As we indicated earlier, the introduction of technologically related products, even if incompatible with the products offered by competitors, is alone neither a predatory nor anticompetitive act. Foremost's tying allegations, therefore, are insufficient to aver the requisite willful acquisition or maintenance element of a monopolization claim or the anticompetitive or predatory conduct element of an attempted monopolization claim. Four of the six acts that Foremost alleged Kodak perpetrated in attempting to monopolize and monopolizing the ''amateur photographic market'' related to these tying allegations. We are left, therefore, with only the two remaining anticompetitive acts pleaded: first, that the 110 system was incompatible with then existing photographic products and

photofinishing equipment, and second, that Kodak withheld the 110 system from the amateur photographic market "until competition from other manufacturers force[d] the introduction" of the system.

It is useful to point out that Foremost's complaint did not attempt to state a claim for relief for monopolization or attempted monopolization on the ground that Kodak's failure to "predisclose" its 110 format to the competition constituted willful maintenance of its monopoly power or predatory or anticompetitive conduct in an attempt to monopolize the market. *See Berkey, supra*, 603 F.2d at 279-85. Nor did Foremost's complaint distinguish among the various product markets which comprise the "amateur photographic market." Therefore, there is no occasion to address whether Foremost's complaint stated a valid claim for relief on the ground that Kodak abused its monopoly power in the film market or used that power as a lever to create, or attempt to create, a monopoly in the markets for amateur still cameras or photographic chemicals or paper. *See id.* at 275-76, 284, 292; *see also Phonetele, Inc. v. American Telephone & Telegraph Co., supra*, 664 F.2d at 739; *Sargent Welch Scientific Co. v. Ventron Corp., supra*, 567 F.2d at 711-12. In the absence of either of these allegations, we hold that Foremost's complaint failed to state a claim upon which relief can be granted for monopolization or attempted monopolization under section 2 of the Sherman Act.

For us to hold that Foremost's allegations were sufficient as a matter of law to satisfy the conduct element of section 2 would be contrary to the very purpose of the antitrust laws, which is, after all, to foster and ensure competition on the merits. "It is the possibility of success in the marketplace, attributable to superior performance, that provides the incentives on which the proper functioning of our competitive economy rests." *Berkey, supra*, 603 F.2d at 281. A monopolist, no less than any other competitor, is permitted and indeed encouraged to compete aggressively on the merits, and any success it may achieve solely through "the process of invention and innovation" is necessarily tolerated by the antitrust laws. *Id., quoting United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295, 344 (D. Mass. 1953), *aff'd*,

347 U.S. 521 (1954) (per curiam); *see* 3 P. Areeda & D. Turner, *Antitrust Law* ¶ 626b (1978). Foremost's complaint alleged nothing more than conduct of this sort, conduct which is lawful whether or not the defendant enjoys monopoly power in the relevant market. *See Sargent-Welch Scientific Co. v. Ventron Corp., supra,* 567 F.2d at 712 (a monopolist "is not forbidden from improving his efficiency in manufacturing or marketing, even though the effect of doing so will be to maintain or improve his sales"). Indeed, the complaint expressly alleged that Kodak "has dominated the amateur photographic market by continually researching and developing new photographic products."

It is of no legal import that Foremost chooses to characterize the technological incompatibilities of the 110 system with the products offered by Kodak's competitors in 1972, and Kodak's alleged delay in introducing the 110 system, as a form of technological predation. Even assuming that Kodak enjoyed monopoly power in the amateur photographic market, as Foremost alleged in its complaint, Kodak "had the right to redesign its products to make them more attractive to buyers — whether by reason of lower manufacturing cost and price or improved performance." *California Computer Products v. IBM Corp., supra,* 613 F.2d at 744. The antitrust laws did not impose a duty on Kodak to assist Foremost, other photofinishers, or manufacturers of competing cameras, film, paper or chemicals to "survive or expand." *Id. See ILC Peripherals Leasing Corp. v. IBM Corp.,* 458 F. Supp. 423, 439 (N.D. Cal. 1978). (discussing technological innovations by alleged monopolist), *aff'd sub nom., Memorex Corp. v. IBM Corp.,* 636 F.2d 1188 (9th Cir. 1980) (per curiam), *cert. denied,* 452 U.S. 972 (1981). Kodak need not have "constricted its product development so as to facilitate sales of rival products." *California Computer Products v. IBM Corp., supra,* 613 F.2d at 744.

We do not, of course, hold that product innovation is immune from antitrust scrutiny and may never provide the requisite conduct element in support of a claim for monopolization or attempted monopolization under section 2 of the Sherman Act. In all cases, however, "it is not the product introduction itself, but some

associated conduct, that supplies the violation." *Berkey, supra*, 603 F.2d at 286 n.30. Here, the only "associated conduct" pleaded by Foremost in support of its section 2 claim is the creation of technological incompatibilities and Kodak's alleged delay in bringing the 110 system to the market. We have discussed the first in sufficient detail already. As to the second, it seems clear that even a monopolist cannot *exclude* or *restrain* competition in its own market or related markets by delaying the introduction of new, technologically advanced products. In this case, for example, any delay by Kodak in introducing the 110 system could have worked only to the advantage of photofinishers and competing manufacturers. Prior to the introduction of the 110 system, it is obvious that Foremost, along with all other photofinishers, was able to choose among several technologically compatible products offered by Kodak and many of its smaller competitors.

It is appropriate to emphasize that as a general rule, "any firm, even a monopolist, may . . . bring its products to market whenever and however it chooses." *Berkey, supra*, 603 F.2d at 286 (footnote omitted). Without more, it is not unlawful for any competitor in any market to delay the introduction of a new product or an entire line of new products until, as Foremost alleged in this case, the competition forces such introduction. In order to state a claim for relief under section 2, product introduction must be alleged to involve some associated conduct which constitutes an anticompetitive abuse or leverage of monopoly power, or a predatory or exclusionary means of attempting to monopolize the relevant market, rather than aggressive competition on the merits. That the dominant firm in any market may through technological innovation expand its market share, increase consumer brand identification, or create demand for new products is perfectly consistent with the competitive forces that the Sherman Act was intended to foster. The antitrust laws were not intended to invalidate all competitive practices tending to improve a firm's market position. *Hirsh v. Martindale-Hubbell, Inc., supra*, 674 F.2d at 1348.

IV

We now discuss the Robinson-Patman issues. In its sixth claim, Foremost alleged that Kodak violated section 2(e) of the Robinson-Patman Act, 15 U.S.C. § 13(e), by "failing to deliver . . . photofinishing equipment orders within the same sixty-day . . . schedule that [was] given to [Foremost's] competitors" and by "providing technical assistance and services [for the] conversion of . . . photofinishing equipment" only to Foremost's competitors. Foremost alleged in its ninth claim that Kodak violated section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), by "offering price reductions to its other customers in competition with [Foremost], while refusing to offer the same price reductions to [Foremost] on a proportionately equal basis." Specifically, Foremost alleged that Kodak allowed its other customers to order a six-month supply of photographic paper and pay for the order in six monthly installments but did not offer the same terms to Foremost. The district court dismissed these claims for failure to state a claim for relief.

A.

Section 2(e) of the Robinson-Patman Act prohibits discrimination against "purchasers of a commodity bought for resale" by offering or furnishing "services or facilities" that are not "accorded to all purchasers on proportionately equal terms." 15 U.S.C. § 13(e). Kodak argues that the "services or facilities" to which section 2(e) applies are only advertising and promotional services, and thus that neither deliveries of nor technical assistance with respect to photofinishing equipment are covered by the statute. There is a split among the circuits concerning whether the timeliness of delivery services is a form of discrimination cognizable under section 2(e). *Compare, e.g., L & L Oil Co. v. Murphy Oil Corp.*, 674 F.2d 1113, 1119 (5th Cir. 1982) (section 2(e) does not cover discrimination in deliveries), *with Centex-Winston Corp. v. Edward Hines Lumber Co.*, 447 F.2d 585 (7th Cir. 1971) (section 2(e) covers discrimination in deliveries), *cert. denied*, 405 U.S. 921 (1972). We have criticized the *Centex-Winston* position, but have not yet decided whether discrimination in the

timeliness of deliveries may constitute discrimination in "services or facilities" under section 2(e). *See Purdy Mobile Homes, Inc. v. Champion Home Builders Co.*, 594 F.2d 1313,1318 (9th Cir. 1979) (*Purdy*). We need not do so here.

As a general rule, practices related to the resale of commodities are cognizable under section 2(e), while practices related to the original sale of commodities are cognizable under section 2(a). Thus, section 2(e) "appl[ies] only to services or facilities connected with the *resale* of the product by the purchaser." *Purdy, supra*, 594 F.2d at 1317 (emphasis added). *See also Corn Products Refining Co. v. FTC*, 324 U.S. 726, 744 (1945). Foremost's complaint does not allege that Foremost resold the photofinishing equipment whose delivery was supposedly delayed, nor does it allege that it resold the photofinishing equipment for which Kodak allegedly provided technical assistance only to its other customers, competitors of Foremost. Foremost's failure to allege resale of the photofinishing equipment, the commodities with respect to which the alleged discrimination in deliveries and technical services occurred, is a failure as a matter of law to allege a crucial element of a section 2(e) violation. *Purdy, supra*, 594 F.2d at 1317

Foremost never comes to grips with this fatal flaw. Instead, Foremost argues that its complaint states a section 2(e) claim because it resells *other* commodities purchased from Kodak — photographic paper, film and chemicals — in its capacity as an authorized dealer. It is true, as Foremost argues, that section 2(e) covers commodities bought for resale "with or without processing." 15 U.S.C. § 2(e). In addition, the Supreme Court has recognized that commodities may undergo physical alterations during processing and yet still be purchased for resale within the meaning of section 2(e). *See Corn Products Refining Co. v. FTC, supra*, 324 U.S. at 744 (section 2(e) covers discrimination in services and facilities "in all cases where the commodity is to be resold, whether in its original form or in a processed product"). However, that Foremost alleged that it resold photographic chemicals and paper to its customers in connection with the sale of processed photographs is not sufficient. Even if these specific

commodities were purchased for resale within the meaning of *Purdy*, Foremost did not contend that it resells the photofinishing equipment involved in the alleged discrimination. Thus, it has failed to state a claim for relief under section 2(e).

B.

Foremost contends that its section 2(a) allegations demonstrate that Kodak violated this portion of the Robinson-Patman Act by (1) offering a twelve percent price reduction to competitors of Foremost purchasing a six-month supply of photographic paper, and (2) permitting competitors of Foremost to defer payment on a six-month bulk purchase of paper but not offering the same terms to Foremost. Kodak argues that these allegations plead only credit discrimination, which, it contends, is not a form of indirect price discrimination cognizable under section 2(a). *See Craig v. Sun Oil Co.*, 515 F.2d 221, 224 (10th Cir. 1975), *cert. denied*, 429 U.S. 829 (1976). However, Foremost has conceded in its reply brief that it "*does not* allege that Kodak's discrimination toward it as to [the deferred payment credit plan] violates Section 2(a)." We need not decide, therefore, whether to adopt *Craig*.

Foremost argues that its first allegation concerning a twelve percent price reduction is sufficient to state a prima facie claim for relief under section 2(a). Kodak, on the other hand, argues that Foremost has failed to allege at least two completed, contemporaneous sales by the same seller. *See, e.g., Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743, 755 (1947); *Rutledge v. Electric Hose & Rubber Co.*, 511 F.2d 668, 677 (9th Cir. 1975). This element of a prima facie section 2(a) violation stems directly from the language of the statute referring to discriminations "in price between different *purchasers*." 15 U.S.C. § 13(a) (emphasis added). Clearly, a mere "offer" to sell to competing customers at different prices does not satisfy this requirement of two actual, contemporaneous sales. *See Shaw's Inc. v. Wilson-Jones Co.*, 105 F.2d 331, 333 (3d Cir. 1939).

We need not decide whether Foremost's complaint alleges the requisite two contemporaneous sales to competing purchasers

at different prices because it suffers from another flaw fatal to its section 2(a) claim. Section 2(a) expressly provides that such price discriminations are unlawful only "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination . . . ." 15 U.S.C. § 13(a). In this case, therefore, it was incumbent upon Foremost to allege that the price discrimination "may . . . substantially . . . lessen competition" in the photofinishing market. *Id.*

It is undisputed that section 2(a) of the Robinson-Patman Act does not make price discriminations *per se* unlawful. *See Foremost Dairies, Inc. v. FTC*, 348 F.2d 674, 680 (5th Cir.), *cert. denied*, 382 U.S. 959 (1965). And although the statute does not "require that the discriminations must in fact have harmed competition," *Corn Products Refining Co. v. FTC, supra*, 324 U.S. at 742, it is clear that there can be no violation of section 2(a) if the alleged price differential has no potential for adversely affecting competition. *See Janich Brothers, Inc. v. American Distilling Co., supra*, 570 F.2d at 862. The naked demonstrations of injury to a specific competitor without more is not sufficient to show that a price discrimination "may" substantially lessen competition; the test must always focus on injury to *competition*. *See M.C. Manufacturing Co. v. Texas Foundries, Inc.*, 517 F.2d 1059, 1067-68 (5th Cir. 1975), *cert. denied*, 424 U.S. 968 (1976). *See also Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).

Without addressing the dispute about whether section 2(a) requires a mere "possibility" or a more substantial "probability" of injury to competition, *see William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1042 & n.50 (9th Cir. 1981), we take note of the language of section 2(a) itself, which compels the conclusion that a prima facie claim for unlawful price discrimination cannot be stated absent an allegation that the discrimination in price may produce injury to competition. Although the Robinson-Patman Act is a prophylactic statute

which should be construed broadly, consistent with the policies of the antitrust laws, *Great Atlantic & Pacific Tea Co. v. FTC*, 440 U.S. 69, 80 n.13 (1979), neither section 2(a) nor any other provision of the antitrust laws was intended to protect competitors as opposed to competition. *See Mutual Fund Investors, Inc. v. Putnam Management Co.*, 553 F.2d 620, 627 (9th Cir. 1977). Nothing in Foremost's section 2(a) count provides such an allegation or inference of injury to competition. Foremost alleged only that *it* "has sustained increased cost[s] of doing business" and that "competition by *plaintiff* in the photofinishing trade has been lessened, restrained and eliminated" (emphasis added).

Injury to a specific competitor is not enough from which a court may infer that an alleged price discrimination may "substantially" injure competition. If Foremost had alleged that it occupied a substantial share of the photofinishing market, nationally or in any relevant geographic sub-market, or that the alleged discrimination was "sufficient in amount to influence . . . resale prices" of photographic paper, *see FTC v. Morton Salt Co.*, 334 U.S. 37, 47 (1948), or that the photofinishing industry operates on relatively low profit margins, *see Foremost Dairies, Inc. v. FTC*, *supra*, 348 F.2d at 680, such that the alleged discrimination provided Foremost's competitors with a significant competitive advantage even if it did not directly affect retail prices, the issue would be closer. But Foremost did not. Accordingly, Foremost's section 2(a) claim failed to state a claim for relief.

AFFIRMED.

APPENDIX B

United States District Court

CENTRAL DISTRICT OF CALIFORNIA

FOREMOST PRO COLOR, INC., a California corporation, individually and on behalf of all other similarly situated, *Plaintiff,* vs. EASTMAN KODAK COMPANY, a New Jersey corporation, *Defendant.*	**No.CV 76-720-FW** **JUDGMENT**

In this action the parties have stipulated to the dismissal of the 1st cause of action in the 3rd Amended Complaint and such cause of action has been dismissed.

The Court recently has entered summary judgment in favor of Defendant and against Plaintiff on the 2nd, 3rd, 4th and 5th causes of action of the 3rd Amended Complaint.

On September 15, 1978, this Court dismissed Counts 6, 7 and 8, of the 3rd Amended Complaint without leave to amend. The Court also, in such last mentioned order, dismissed Count 9 of the 3rd Amended Complaint with leave to amend. Plaintiff has stated that such 9th cause of action cannot be amended.

Under the circumstances it appears that all of the causes of action in the Plaintiff's 3rd Amended Complaint have been disposed of and that judgment should be entered in this case dismissing the action. Accordingly,

IT IS ORDERED, ADJUDGED AND DECREED that this action is dismissed.

Dated this seventh day of August, 1980.

/s/ FRANCIS C. WHELAN

Francis C. Whelan
United States District Judge

United States District Court

CENTRAL DISTRICT OF CALIFORNIA

FOREMOST PRO COLOR, INC., a California corporation, etc *Plaintiff(s),* vs. EASTMAN KODAK COMPANY, a New Jersey corporation, *Defendant(s).*	**CASE NUMBER** **CV 76-720-FW** **NOTICE OF ENTRY**

TO THE ABOVE NAMED PARTIES AND TO THEIR ATTORNEY(S) OF RECORD:

You are hereby notified that ORDER DISMISSING CERTAIN CAUSES OF ACTION in the above entitled case was entered in the docket on SEPTEMBER 18, 1978.

You are also notified that if this case was tried and you introduced exhibits into evidence, they must be claimed at this office *after* the expiration of thirty days from the receipt of this notice. (After *sixty* days in cases in which the United States, its officers or agencies were parties) Unless they are claimed within thirty days after the expiration of the above period, they will be destroyed pursuant to Local Rule 20(a). If an appeal is taken they will, of course, be held until the Appellate Court finally determines the matter. Exhibits which are attached to a pleading will not be destroyed but will remain as a permanent record in the case file.

CERTIFICATE OF MAILING

I, Edward M. Kritzman, Clerk, United States District Court, Central District of California, and not a party to the within action, hereby certify that on SEPTEMBER 18, 1978, I served a true copy

of this notice of entry on the parties in the within action by depositing true copies thereof, enclosed in sealed envelopes, in the United States Mail in the United States Post Office mail box at Los Angeles, California, addressed as follows:

O'MEVENY & MYERS	ROBERT C. FORTUNE
611 West 6th St.	100 Oceangate #1200
Los Angeles, California	Long Beach, Calif. 90802

/s/ EDWARD M. KRITZMAN
Edward M. Kritzman
Deputy Clerk

NOTICE
IN ACTIONS ARISING UNDER THE ECONOMIC STABILIZATION ACT, THE EMERGENCY PETROLEUM ALLOCATION ACT, AND THE ENERGY POLICY AND CONSERVATION ACT, NOTICES OF APPEAL TAKEN FROM THIS JUDGMENT MUST BE FILED IN THE TEMPORARY EMERGENCY COURT OF APPEALS IN ACCORDANCE WITH THE RULES OF PROCEDURE OF THAT COURT.

United States District Court

CENTRAL DISTRICT OF CALIFORNIA

FOREMOST PRO COLOR, INC., a California corporation, individually and on behalf of all other similarly situated, *Plaintiffs,* vs. EASTMAN KODAK COMPANY, a New Jersey corporation, *Defendant.*	**No. CV 76-720-FW** **ORDER DISMISSING CERTAIN CAUSES OF ACTION**

In this action, Defendant has moved to dismiss the sixth, seventh, eighth and ninth causes of action of the third amended complaint. The matter came on regularly for hearing with counsel for both parties present. After oral argument, the matter was taken under submission by the Court. Having considered the arguments, both written and oral, and the documents on file herein, the Court is of the opinion the motion should be granted.

The Plaintiff has attempted four times in two years to plead a cause of action for violation of federal anti-trust laws. The sixth cause of action in the third amended complaint is substantially similar to the sixth and tenth causes of action previously dismissed in the second amended complaint. The seventh cause of action here presented is substantially similar to the seventh, eighth and ninth causes of action of the second amended complaint, also previously dismissed. The eighth cause of action of the third amended complaint is also substantially similar to the previously dismissed eleventh cause of action in the second amended com-

plaint. Thus, the sixth, seventh and eighth causes of action should be dismissed for failure to state a claim upon which relief can be granted. Under the circumstances of this case, the Court can find no good cause to allow Plaintiff to continue its attempts to amend these causes of action.

The ninth cause of action of the third amended complaint presents a new claim for violation of §2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. §13(a). The complaint sets forth "the defendant offered to its customers, other than plaintiff, a 12 per cent price reduction on the sale of a six-months supply of color photographic paper ordered in advance." (Third Amended Complaint at 26.) The complaint, however, alleges Defendant did offer the price reduction to Plaintiff, albeit on different terms of credit from that accorded other purchasers. This Court agrees with the ruling of *Craig v. Sun Oil Co.*, 515 F.2d 221, 244 (10th Cir. 1975), wherein it is states: "[t]he trial court concluded that . . . discrimination in credit terms as alleged could not, as a matter of law, be the basis for a claim under 15 U.S.C. §13(a) or (e). We agree with this conclusion." Thus, under the ninth cause of action also, Plaintiff has failed to state a claim upon which relief can be granted.

Accordingly,

IT IS ORDERED that counts six, seven and eight of the third amended complaint be dismissed without leave to amend.

IT IS FURTHER ORDERED that count nine be dismissed with leave to amend in the event Plaintiff can allege facts to show discrimination in the price of Defendant's products in favor of other purchasers of Defendant's products and against Plaintiff.

DATED this fifteenth day of September, 1978.

/s/ FRANCIS C. WHELAN
Francis C. Whelan
United States District Judge

APPENDIX C

FEDERAL STATUTES

(United States Codes)

15 U.S.C. Section 1:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. Section 2:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. Section 3:

Every contract, combination in form of trust or otherwise, or consipiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any

State or States or foreign nations, is declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. Section 13:

(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however*, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be

construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further*, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitior.

(c) It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction

other than the person by whom such compensation is so granted or paid.

(d) It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

(e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

(f) It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

15 U.S.C. Section 14:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agree-

ment, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

(Federal Rules of Civil Procedure)

Rule 8:

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

(b) Defenses; Form of Denials. A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, he

may do so by general denial subject to the obligations set forth in Rule 11.

(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

(d) Effect of Failure to Deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) Pleading to be Consise and Direct; Consistency.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.

(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice.

APPENDIX D

In The United States District Court

FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *Plaintiff*, v. EASTMAN KODAK COMPANY, a corporation, *Defendant*.	**Civil Action No. 6450** **Filed: December 21, 1954**

FINAL JUDGMENT

Plaintiff, United States of America, having filed its complaint herein on the 21st day of December, 1954, and defendant, Eastman Kodak Company, by its attorneys, having appeared and filed its answer to such complaint denying the substantive allegations thereof, and plaintiff and said defendant having severally consented to the making and entry of this Final Judgment without trial or adjudication of any issue of fact or law herein and without admission in respect to any issue:

NOW, THEREFORE, before any testimony has been taken and without trial or adjudication of any issue of fact or law herein and upon consent of the parties hereto, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

I

This Court has jurisdiction of the subject matter hereof and of the parties hereto. The complaint states a claim against defendant Eastman Kodak Company under Sections 1, 2 and 3 of the Act of

Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," as amended, commonly known as the Sherman Act.

II

As used in the Final Judgment:

(A) "Eastman" shall mean the Eastman Kodak Company, a corporation organized and existing under the laws of the State of New Jersey;

(B) "Defendant Eastman" shall mean Eastman and all of its subsidiaries;

(C) "Person" shall mean any individual, partnership, firm, corporation, association, trustee or any other business of legal entity;

(D) "To process" or "processing" shall mean to process, develop and/or finish color film, and/or to make color prints, duplicates and/or transparencies, and/or the mounting thereof;

(E) "Still color film" shall mean any photographic still color film used or capable of use by the general public in still cameras;

(F) "Motion picture color film" shall mean any photographic motion picture color film of less than 35mm in width used or capable of use by the general public in motion picture cameras;

(G) "Color film" shall mean still color film and motion picture color film;

(H) "Type of color film" shall mean all that still color film, whether of the same or different kind of color film which is designed to produce the same end result, such as either (1) a still color transparency, or (2) a still color print;

(I) "Kind of color film" shall mean all still color film of the same type of color film, regardless of brand name or camera size, which may be processed in substantially the same manner or a modification thereof;

(J) "Color print material" shall mean any material used or usable for the making of color prints, duplicates and/or transparencies from exposed color film;

(K) "Facilities" shall mean those machines and equipment used or usable in the processing of color film, and may include land or building used by Eastman in connection therewith;

(L) "Patents" shall mean any, some or all claims in the following United States Letters Patent:

(1) Letters patent owned or controlled by Eastman on the date of entry of this Final Judgment;

(2) Letters patent which may be granted on applications for Letters Patent which applications are on file in the United States Patent Office and owned or controlled by Eastman on the date of entry of this Final Judgment;

(3) Letters Patent which may be granted on applications for Letters Patent which applications are filed and owned or controlled by Eastman in the United States Patent Office whithin a period of five (5) years following the date of entry of this Final Judgment;

(4) Letters Patent which may be acquired by or under which Eastman acquires the right to grant licenses within a period of five (5) years following the date of entry of this Final Judgment, and reissues and extensions thereof;

(5) Divisions, Continuations, reissues or extensions of the Letters Patent described above in clauses (1), (2), and (3) which relate to processing (including the processing of color print material), and to machines or equipment necessary for such processing.

III

The provisions of this Final Judgment applicable to defendant Eastman shall apply to Eastman, its officers, agents, servants, employees, subsidiaries, successors and assigns, and to those persons in active concert or participation with it who receive actual

notice of this Final Judgment by personal service or otherwise, but shall not apply to transactions solely between Eastman and said officers, agents, servants, employees, subsidiaries, or any of them. The provisions of this Final Judgment shall not be deemed to relate to activities or operations outside of the United States of defendant Eastman. Eastman is ordered and directed to take such steps as are necessary to secure compliance by its officials, subsidiaries and such other persons, described above, with the terms of this Final Judgment.

IV

(A) Eastman is ordered and directed to cancel any provision of any existing fair trade contract which fixes or controls the resale price of any of its color film; Provided, however, that after eight years from the effective date of this Final Judgment Eastman may apply to the Court for an order permitting Eastman to avail itself of any rights it may then otherwise have under any statute of the United States relating to resale price maintenance.

(B) Defendant Eastman is enjoined and restrained from entering into or enforcing any contract, agreement, or understanding with any other person to fix, establish, maintain or adhere to the prices, terms or conditions of sale of any of its color film or color print material sold to third persons.

V

(A) Defendant Eastman is enjoined and restrained from, directly or indirectly:

(1) Selling its color film on any basis which includes any charge for the processing of said film or any agreement to process such film;

(2) Contracting or entering into any understanding with any person, other than a governmental agency, that such person will send any color film manufactured by Eastman to Eastman for processing;

(3) Distributing, selling or otherwise making available

its color film on any condition or understanding, express or implied, that the purchaser or recipient thereof will send or cause to be sent color film to Eastman or any other designated source for processing;

(4) Tying or otherwise connecting in any manner the sale of its color film to the processing thereof, or the processing of its color film to the sale thereof;

(5) Making any charge for the sale of its color film or the processing thereof which has the purpose or effect of tying the processing to the sale of its color film;

(B) Defendant Eastman is ordered and directed to make separate changes for the sale of its color film and for the processing of its color film;

(C) Nothing in this Section V shall be deemed to apply to the distribution, sale or processing of the particular color film manufactured by Eastman which is (1) in existence on or before the applicable effective dates of this Section V, (2) sold or processed pursuant to government contracts in existence on or bids made before the date of entry of this Final Judgment, or (3) sold for export outside the United States; nor shall this Section V prohibit defendant Eastman from holding itself out as a processor of color film. The provisions of subsections (A) and (B) of this Section V shall become effective six months after the effective date of this Final Judgment with respect to still color film and twelve months after said effective date with respect to motion picture color film other than such film packaged in magazines, and with respect to motion picture color film packaged in magazines this Section V shall be effective upon the expiration of 21 months after said effective date. Eastman may move the Court for approval of the program, adopted by it for the sale of all of its motion picture color film packaged in magazines without a processing charge being included in the selling price thereof, at any time after said program has been in operation for a period of twelve months, and the plaintiff shall have the right to be heard thereon.

VI

(A) Eastman is ordered and directed:

(1) Insofar as it now has or may acquire the power or authority to do so, to grant to any applicant, making written request therefor, a nonexclusive and unrestricted license or sublicense to process color film in the United States and to make, use and sell equipment or machines necessary so to process, for the life of the patent, under any, some or all of its patents, without any limitation or condition whatsoever except that:

(a) a reasonable and nondiscriminatory royalty may be charged and collected;

(b) reasonable provision may be made for periodic inspection of the books and records of the licensee by an independent auditor or other person acceptable to both the licensee and licensor, who shall report to the licensor only the amount of the royalty due and payable and no other information;

(c) the license may be nontransferable;

(d) reasonable provision may be made for cancellation of the license upon failure of the licensee to pay the royalties or to permit the inspection of its books and records as provided in this Section VI;

(e) the license must provide that the licensee may cancel the license at any time after one year from the initial date thereof by giving thirty (30) days notice in writing to the licensor;

(2) Upon receipt of any written application for a license under any patent, to advise the applicant of the royalty it deems reasonable for the patent or patents to which the application pertains. If Eastman and the applicant are unable to agree upon what constitutes a reasonable royalty, Eastman may apply to the Court for a determination of a reasonable royalty, giving notice thereof to the applicant and the Attor-

ney General, and shall make application forthwith upon request of the applicant. In any such proceeding the burden of proof shall be upon Eastman to establish the reasonableness of any royalty requested. Pending the completion of any such court proceeding, the applicant shall have the right to process color film and to make, use and sell equipment or machines necessary to so process under the patent or patents to which its application pertains, without the payment of royalty or other compensation, but subject to the following provisions: Eastman may, with notice to the Attorney General, apply to the Court to fix an interim royalty rate pending final determination of what constitutes a reasonable royalty. If the Court fixes such interim royalty rate, a license shall then issue providing for the periodic payment of royalties at such interim rate from the date of the making of such application by the applicant; and whether or not such interim rate is fixed, any final order may provide for such adjustments, including retroactive royalties, as the Court may order after final determination of a reasonable and nondiscriminatory royalty, and such royalty rate shall apply to the applicant and to all other licensees under the name patent or patents.

(B) Nothing herein shall prevent any applicant from attacking at any time the validity or scope of any of the patents nor shall this Final Judgment be construed as imputing any validity or value to any of said patents;

(C) Eastman is enjoined and restrained from:

(1) Instituting or threatening to institute any action, suit or proceeding for acts of infringement occurring prior to the date of entry of this Final Judgment under any patents;

(2) Making any disposition of any patents which deprives it of the power or authority to issue the licenses required by this Final Judgment unless Eastman requires as a condition of the sale, assignment or grant that the purchaser, assignee or licensee shall observe the provisions of this Section VI of this Final Judgment with respect to the patents so acquired and that such purchaser, assignee or licensee

shall file with this Court prior to the consummation of such transaction a written undertaking to be bound by the provisions of Section VI of this Final Judgment with respect to the patents so acquired;

(3) Acquiring, for a period of five years, any license, sublicense, grant of immunity or similar right under any patent unless such license, sublicense, grant of immunity or similar right in non-exclusive, and Eastman shall make a bona fide effort (not including additional monetary consideration) to persuade the licensor to (a) make available an equivalent license, sublicense, grant of immunity or similar right to any third person requesting the same, on terms and conditions at least as favorable as those accorded to Eastman, or (b) grant to Eastman a full and unrestricted power to sublicense pursuant to the terms of this Final Judgment.

VII

(A) Upon written application therefor, Eastman is ordered and directed to furnish, within a reasonable time, to any applicant engaged in, or who has a bona fide desire to engage in, the processing in the United States of any kind of its color film:

(1) A written manual, and such supplements thereto as are hereinafter provided for a subparagraph (2) of this paragraph (A) describing the methods of processing, including the mixing of chemicals, used by Eastman on the date of issuance of such manuel in its commercial processing of such kind of color film;

(2) On or about the First of July in each of the seven calendar years commencing January 1, 1956, supplements to said manuals referred to in paragraph (1) above, bringing such manuals up to date and describing any change in such methods of processing;

(B) The furnishing of such manual and supplements shall be unconditional except that Eastman may make a reasonable initial charge not to exceed $100, plus a rasonable charge not to exceed

$10, for the said manual or supplements. The furnishing of a manual or supplements thereto under paragraphs (1) and (2) of this Section VII shall not confer upon the recipient a license under any patents which cover any subject matter contained in said manual or supplements;

(C) Defendant Eastman is enjoined and restrained from making any disposition of any information, technical or otherwise, used or usable for the processing of its color film on any basis which would restrict Eastman from complying with any of the provisions of this Final Judgment with respect to such information.

VIII

(A) For a period of eight years following the effective date of this Final Judgment, after receipt of a written request, Eastman is ordered and directed to send to the plant of any recipient of a manual under Section VII hereof a person technically qualified in the method of commercial processing then being used by Eastman for its color film, to supplement, explain or demonstrate the technical information contained in said manuel and supplements for the purpose of assisting such recipient to adapt to his commercial processing of said film, the methods and processes described in said manual and supplements. For each such person Eastman may charge an amount not to exceed his traveling and living expenses and the actual cost to Eastman for the time involved. This Section shall not require Eastman to send any person outside of the Continental limits of the United States.

(B) During a period of eight years following the effective date of this Final Judgment any recipient of a manual under Section VII hereof shall, upon written application, and at his own expense, be permitted to visit Eastman plants processing color film in Rochester, New York, Chicago, Illinois, and Palo Alto, California, for the purpose of observing and being advised as to the methods, processes, machines and equipment then being used by Eastman in its commercial processing of it color film; provided, however, that such visits may be restricted as follows:

(1) to not more than three officers or employees of the recipient at any one time;

(2) to not more than four such visits per year; and

(3) to a certain specifically designated time in any calendar month.

IX

For a period of eight years from the effective date of this Final Judgment, Eastman is ordered and directed, upon written request, to furnish, at the cost of reproduction thereof, to any applicant for use in the United States, such plans and specifications owned or controlled by Eastman for any machines or equipment then used by Eastman in the commercial processing of its color film, as are reasonably necessary to enable the construction of such machines or equipment.

X

After six months following the effective date of this Final Judgment and thereafter, Eastman is ordered and directed to offer for sale and sell through its then regular distribution channels in the United States color film of the kind sold or distributed by it under the trademark Ektachrome, in all camera sizes, including 35 millimeter, in which is it then marketing Kodachrome still roll film. At any time after five years from said effective date Eastman may apply to the Court to be relieved of the above obligation as to any particular camera size of Ektachrome film upon a showing that sales of such size of film are so small or have so decreased that the obligation is no longer warranted.

XI

Commencing six months after the effective date of this Final Judgment and for ten years thereafter, Eastman is ordered and directed to offer to sell and sell on reasonable and undiscriminatory terms and conditions through its then regular distribution channels in the United States:

(A) Processing chemicals or mixed chemicals then used or manufactured and used by Eastman for commercial processing of its color film or manufactured by Eastman for commercial processing of its color film;

(B) Color print material used or manufactured and used by Eastman for commercial processing of its color film;

so long as products so substantially similar thereto as to be interchangable therewith are not readily available from sources other than Eastman. If Eastman does not, because of short supply, fill all bona fide orders for each of such products, Eastman must prorate such products among the then processors (including Eastman) of its color film, but in any event Eastman shall make available to others at least 50% of its then production of each such product.

XII

(A) Seven years from the effective date of this Final Judgment Eastman shall divest itself, under a court-approved plan, of so much of its facilities as may be in excess of 50% of the then domestic capacity for processing Eastman still color film of each type actually produced by Eastman. Notwithstanding the foregoing, no divestiture shall be required if Eastman subsequent to six years from said effective date shows to the satisfaction of the Court that purchasers of each kind of Eastman still color film have an option, actual and practical in fact, including reasonable availability in the general area in which the purchasers are located, to have the processing of such Eastman still color film performed by processors other than Eastman, and that such other processors then process a substantial volume of such film. If Eastman at that time, or thereafter on motion by the Plaintiff, is unable to show why existence of such an actual and practical option with respect to the processing of any kind of Eastman still color film of any type, and is unable to show that such processors process a substantial volume of its color film, then Eastman shall not be required to divest itself of any facilities for processing such kind of Eastman film so long as Eastman is able to show to the satisfaction of the Court that such kind of Eastman film does not represent a substan-

tial percentage of the total Eastman still color film of the same type;

(B) At any time after eight years from the effective date of this Final Judgment plaintiff may apply to the Court for such additional relief, including divestiture of processing facilities, as may be necessary to establish substantial competition in the processing of color film generally;

(C) Nothing in this Section XII shall deprive either party of the rights conferred by Section XVII hereof.

XIII

Eastman is ordered and directed to:

(A) Make a public announcement that its color film will be sold only without processing charges included in the price thereof, and to supply to its dealers, leaflets or advertising material for distribution or notification to the public announcing the same;

(B) Notify those of its customers in the United States known by it to be photo-finishers and processors of film that its color film will be sold only without a processing charge included in the price thereof and that the licenses, manuals, technical assistance, print materials and chemicals are available as provided for in this Final Judgment, and to announce the same in at least two trade magazines for the photofinishing or processing trade.

XIV

Nothing contained in Sections VI, VII, VIII, IX, X and XI of this Final Judgment shall be construed to impose upon Eastman any responsibility or liability to others except to furnish the matters and/or services specifically described therein, and Eastman shall not be deemed to have made thereby any representation other than that such matters and/or methods conform to those used by Eastman in its commercial processing of color film, nor shall said Sections be construed to create in anyone other than the plaintiff herein any rights or claims against Eastman that do not otherwise exist.

XV

(A) This Final Judgment shall take effect upon the expiration of ninety (90) days after the date of its entry;

(B) The making and entry of this Final Judgment shall not constitute any bar or estoppel against either (1) any suit or proceeding which may be instituted by the plaintiff herein except in the field of processing of color film by Eastman or (2) against Eastman with respect to any defenses that Eastman may raise should any such suit or proceeding except in the field of processing of color film by Eastman be instituted.

XVI

For the purpose of securing compliance with this Final Judgment and for no other purpose, and subject to any legally recognized privilege, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to Eastman made to its principal office, be permitted (1) access during the office hours of Eastman to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Eastman relating to any of the subject matters contained in this Final Judgment, and (2) subject to the reasonable convenience of Eastman and without restraint or interference from it to interview officers or employees of defendant Eastman who may have counsel present, regarding any such matters; and upon such request Eastman shall submit such reports in writing to the Department of Justice with respect to matters contained in this Final Judgment as may from time to time be necessary to the enforcement of this Final Judgment. No informaiton obtained by the means provided in this Section XVI shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department except in the course of legal proceedings to which the United States of America is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

XVII

Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment or for the modification or termination of any of the provisions thereof, and for the enforcement of compliance therewith and punishment of violations thereof.

Dated: December 21, 1954

/s/ JOHN KNIGHT
John Knight
United States District Judge

We hereby consent to the making and entry of the foregoing Final Judgment:

For the Plaintiff:

/s/ STANLEY N. BARNES
Stanley N. Barnes
Assistant Attorney General

/s/ HARRY N. BURGESS
Harry N. Burgess

/s/ CHARLES F. B. McALEER
Charles F. B. NcAleer
Attorneys

/s/ W.D. KILGORE, JR.
W. D. Kilgore, Jr.

/s/ WORTH ROWLEY
Worth Rowley
Special Assistants to the
Attorney General

/s/ ALLEN A. DOREY
Allen A. Dobey

/s/ WILLIAM P. ROGERS
William P. Rogers
Trial Attorneys

For the Defendant:

/s/ WILLIAM J. DONOVAN

William J. Donovan
Donovan, Leisure, Newton & Irvine
by William J. Donovan

/s/ CARL T. NIXON

Carl T. Nixon
Nixon, Hargrove, Devans & Dey
By: Carl T. Nixon

Counsel for Eastman Kodak Co.

Of Counsel:
James R. Withrow, Jr.
Arthur L. Stern

APPENDIX E

United States District Court

FOR THE CENTRAL DISTRICT OF CALIFORNIA

FOREMOST PRO COLOR, INC., a California corporation, Individually and On Behalf of All Other Similarly Situated, *Plaintiff,* vs. EASTMAN KODAK COMPANY, a New Jersey corporation, *Defendant.*	**CIVIL ACTION No. CV 76-720-FW** **THIRD AMENDED COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF CLASS ACTION** **JURY TRIAL DEMANDED**

Plaintiff, FOREMOST PRO COLOR, INC., individually and on behalf of all others similarly situated, appears herein by its attorney and complains of defendant, EASTMAN KODAK COMPANY, as follows:

ALLEGATIONS APPLICABLE TO ALL CLAIMS FOR RELIEF

Jurisdiction

1. The jurisdiction of this Court for all claims for relief is predicated upon its power to hear any civil action among parties who maintain a diversity of citizenship between themselves (28 U.S.C. §1332). The jurisdiction of this Court for the sixth through eighth claims for relief is predicated upon its power to hear any civil action among parties arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies (28 U.S.C. §1337), and upon its power

to hear any civil action among parties arising under the Constitution, laws or treaties of the United States (28 U.S.C. §1331).

2. The amounts in controversy for all claims for relief exceed the sum of $10,000.00, exclusive of interest and costs.

Venue

3. Defendant EASTMAN KODAK COMPANY is a New Jersey corporation licensed to do business in the State of California, and transacting such business in the Central District of California. The unlawful interstate activities of defendant alleged herein were and continue to be performed in substantial part within the Central District of California. Therefore, venue for this action is predicated upon Sections 4, 12 and 16 of the Clayton Act (15 U.S.C. §15, 22 and 26) and upon 28 U.S.C. §1391.

Parties

4. Plaintiff FOREMOST PRO COLOR, INC. is, and at all times hereinafter mentioned was, a corporation duly organized and existing under the laws of the State of California with its principal place of business located at 12145 Paramount Boulevard, Downey, California.

5. Defendant is, and at all times hereinafter mentioned was, a corporation duly organized and existing under the laws of the State of New Jersey with its principal place of business located at 343 State Street, Rochester, New York.

Definitions

6. As used in this Complaint, the word "photofinishing" refers to a two-step procedure, whereby film is transformed into a negative image (film processing or developing), which, in turn, is imprinted on sensitized photographic paper (printing), and then chemically immersed to produce an observable image (print processing).

7. As used in this Complaint, the term "photofinishing equipment" refers to that photographic equipment, such as film

processors, paper processors, color printers, lenses, and other printing and print processing equipment which are used by plaintiff, defendant and other photofinishers to develop film into negatives, and to print and print process those negatives into photographs.

8. As used in this Complaint, the term "Kodacolor II" and "Kodacolor X" refer to types of color film manufactured by defendant.

9. As used in this Complaint, the numbers "110" and "126" refer to a size of color film manufactured by defendant.

10. As used in this Complaint, the term "amateur photographic market" refers to that non-professional segment of the photographic market that purchases color film, cameras, photographic paper and chemistry. It does not include the instant print market.

FIRST CLAIM FOR RELIEF

11. On or about January 11, 1973, in Downey, California, plaintiff and defendant, for valuable consideration, entered into a written contract. By this contract, defendant agreed to sell to plaintiff one "8S-4 Kodak Enlarging Color Printer" with attachments and lenses (hereinafter referred to collectively as the "enlarger"), which would enable plaintiff to produce 5-inch by 7-inch and 8-inch by 10-inch color photographic prints, both with and without photographic borders. The enlarger was to be delivered to and installed at plaintiff's facilities by defendant on March 1, 1973.

12. All conditions precedent to defendant's contractual performance have been performed by plaintiff or have occurred.

13. Other than for those alleged in Paragraph 14 of this Complaint, all conditions precedent to plaintiff's contractual performance have been performed by defendant or have occurred.

14. From March 1, 1973, and continuing thereafter until on or about June 1, 1974, defendant breached this contract by failing

to perform the conditions on the contract. Specifically, defendant failed to:

(a) deliver and complete installation of the enlarger when promised;

(b) deliver all attachments and lenses covered by the contract;

(c) furnish labor and materials to test the enlarger during installation;

(d) credit certain items allegedly delivered pursuant to the contract, but not ordered by plaintiff; and

(e) refrain from charging plaintiff twice for certain items delivered pursuant to the terms of the contract.

15. Moreover, in reliance upon defendant's contractual promises and with defendant's knowledge, plaintiff employed and trained two men to sell photographic prints to be produced by this enlarger. Plaintiff was required to terminate the employment of these two men when defendant failed to deliver and complete installation of the enlarger on March 1, 1973.

16. As a result of defendant's breach of contract, plaintiff has sustained monetary damage in the sum of $50,000.00 by:

(a) reimbursing defendant twice for some items doubly charged it by defendant;

(b) reimbursing defendant for attachments and lenses not received from defendant;

(c) reimbursing defendant for certain items received but not ordered from defendant, and for which it was charged by defendant;

(d) expending its own labor and materials for the testing of the enlarger during the sixteen-month installation period;

(e) being unable to produce 5-inch by 7-inch and 8-inch by 10-inch photographic prints during this sixteen-month period, and, as a result, being forced to send this type of

work elsewhere for photofinishing; and

(f) incurring expenses in the training of salesmen.

SECOND CLAIM FOR RELIEF

17. On or about August 1, 1973, in Downey, California, plaintiff received written correspondence from defendant informing plaintiff of defendant's intention to discontinue the latter's production of "Kodak Ektacolor 20 Paper" and "Kodak Ektaprint C Chemicals" (hereinafter referred to as the "paper" and "chemistry," respectively). Defendant's replacement papers — "Kodak Ektacolor 30 Paper" and "Kodak Ektacolor 37 RC Paper" — and replacement chemistry — "Kodak Ektaprint 3 Chemicals" (hereinafter referred to as the "replacement papers" and "replacement chemistry," respectively) — were not compatible with the then existing paper and chemistry.

18. Furthermore, to utilize defendant's new replacement papers and replacement chemistry, extensive modifications to plaintiff's photofinishing equipment were required. On or about August 1, 1973, defendant offered plaintiff, in writing, to send one of its Technical Sales Representatives (hereinafter referred to as "TSR") to assist and supervise plaintiff in a modification and conversion of the latter's photofinishing equipment to accommodate the replacement papers and replacement chemistry.

19. On or about August 1, 1973, plaintiff accepted defendant's offer to assist and supervise the modifications and conversion to plaintiff's photofinishing equipment. Pursuant to defendant's written offer, plaintiff scheduled the modification and conversion of its photofinishing equipment with defendant for on or about August 15, 1973, which was the date when defendant stated that a TSR would be available.

20. All conditions precedent to defendant's contractual performance have been performed by plaintiff or have occurred.

21. Other than for those alleged in Paragraph 22 of this Complaint, all conditions precedent to plaintiff's contractual performance have been performed by defendant or have occurred.

22. On or about August 15, 1973, defendant breached this contract by failing to assist and supervise the modification and conversion of plaintiff's photofinishing equipment. Defendant failed to notify plaintiff that defendant would not aid and supervise plaintiff in the modification and conversion of the latter's photofinishing equipment, and at the prearranged time and date, defendant's TSR failed to appear at plaintiff's photofinishing facilities. Because all efforts on plaintiff's part to secure defendant's aid and supervision were to no avail, plaintiff was required to modify and convert its photofinishing equipment without the promised aid and supervision of the defendant.

23. As a result of defendant's breach of contract, plaintiff has sustained monetary damage in the sum of $15,000.00 by a loss of material, labor, business and business reputation.

THIRD CLAIM FOR RELIEF

24. On or about July 20, 1972, in Downey, California, plaintiff and defendant, for valuable consideration, entered into a written contract. By this contract, defendant agreed to sell to plaintiff an attachment and two lenses (hereinafter referred to collectively as the "attachment") to print defendant's new 110 Kodacolor II film. The terms of the contract provided that the attachment was to be delivered to and installed at plaintiff's facilities by defendant on September 1, 1972.

25. All conditions precedent to defendant's contractual performance have been performed by plaintiff or have occurred.

26. Other than for those alleged in Paragraph 27 of this Complaint, all conditions precedent to plaintiff's contractual performance have been performed by defendant or have occurred.

27. From September 1, 1972, and continuing thereafter until on or about July 26, 1973, defendant breached this contract by failing to deliver and install the attachment as agreed. This forced plaintiff to subcontract, on behalf of some of its customers, all 110 film photofinishing jobs. In addition, other customers of plaintiff that knew plaintiff was unable to process the 110 size film sent

their 110 photofinishing to plaintiff's competitors causing plaintiff to lose these sales during this period.

28. As a result of defendant's breach of contract, plaintiff has sustained monetary damage in the sum of $100,000.00 by a loss of business and business reputation.

FOURTH CLAIM FOR RELIEF

29. On or about August 1, 1973, in Downey, California, plaintiff and defendant, for valuable consideration, entered into a written contract, a copy of which is only in defendant's possession. By this contract, defendant agreed to sell to plaintiff three printing lenses, which would enable plaintiff to produce borderless photographic prints. The terms of the contract provided that the lenses were to be delivered to and installed at plaintiff's facilities by defendant on September 1, 1973.

30. All conditions precedent to defendant's contractual performance have been performed by defendant or have occurred.

31. Other than for those alleged in Paragraph 32 of this Complaint, all conditions precedent to plaintiff's contractual performance have been performed by defendant or have occurred.

32. From September 1, 1973, and continuing thereafter until on or about September 15, 1974, defendant breached this contract by failing to deliver and install the three lenses as agreed. This forced plaintiff's customers to send their borderless photofinishing jobs elsewhere from September 1, 1973, until on or about September 15, 1974, resulting in lost sales to plaintiff.

33. As a result of defendant's breach of contract, plaintiff has sustained monetary damage in the sum of $250,000.00 by loss of business and business reputation.

FIFTH CLAIM FOR RELIEF

34. On or about May 1, 1973, defendant offered, in writing, to assist plaintiff in the conversion of the latter's photofinishing facilities to enable plaintiff to process defendant's new 110 Koda-

color II film. Defendant further offered to advise plaintiff of any new changes defendant may make in the future concerning this new film, and to send one of its TSR's to plaintiff's plant to assist plaintiff in maintaining high quality photofinishing of defendant's new film.

35. Plaintiff accepted defendant's offer and, in reliance thereon and with defendant's knowledge, plaintiff purchased new photofinishing equipment to enable it to photofinish defendant's new film.

36. All conditions precedent to defendant's contractual performance have been performed by plaintiff or have occurred.

37. Other than for those alleged in Paragraph 38 of this Complaint, all conditions precedent to plaintiff's contractual performance have been performed by defendant or have occurred.

38. On or about May 1, 1973, and continuing thereafter to the present, defendant has failed to provide plaintiff with such assistance or to advise plaintiff of any new changes defendant has made regarding this new film. Plaintiff has made repeated demands on defendant to supply the assistance and information promised, but to no avail. Consequently, plaintiff has been unable to photofinish this new film satisfactorily.

39. As a result of defendant's breach of contract, plaintiff has sustained monetary damage in the sum of $500,000.00 by being unable to deliver a high quality product to its customers consistent with plaintiff's past business performance, and by a loss of material, labor, business and business reputation.

TRADE AND COMMERCE ALLEGATIONS APPLICABLE TO THE SIXTH, SEVENTH, EIGHT AND NINTH CLAIMS FOR RELIEF

40. Photofinishing, or the production of an observable photographic print, entails two successive procedures: "film processing" or "developing;" and "printing and print processing." After film is exposed by the taking of pictures, it is transformed

into a negative by immersing the film in various chemical solutions. This procedure is known as "film processing." Thereafter, the negative is placed between a light source, which generally is contained in an enlarging printer, and sensitized photographic paper. The exposure of light through the negative onto the sensitized photographic paper by a photographic lense in the enlarger imprints a latent image, which cannot be seen unaided by the human eye. To produce an observable image, the sensitized photographic paper must be immersed in other chemical solutions. This procedure is known as "printing and print processing." Hence, the final product essentially entails nothing more than transferring the characteristics of the negative onto photographic paper, and by developing the latent image through chemical processing into a photographic print.

41. Defendant is the leading developer and manufacturer of photofinishing equipment, replacement parts, cameras, accessories, photographic paper, chemical solutions, processing procedures and film in the United States. Because of defendant's dominant market position in the photographic industry, over 85 percent of all photofinishing done in the United States involves the use of defendant's photo-printing equipment, film, photographic paper and chemical solutions. These commodities are manufactured, distributed and sold by defendant in interstate commerce to authorized Kodak dealers and to independent photofinishing laboratories located throughout the United States.

42. Moreover, because defendant has the largest research and development division of any of the nation's photographic manufacturers, it is in a unique position to offer technical services and information about its photo-printing equipment, film, photographic paper, chemical solutions and processing procedures. Defendant also exclusively controls technical services and information about the procedures necessary for the maintenance of its photo-printing equipment, and the handling characteristics of and proper photofinishing procedures for these commodities. This information is not available from any other reliable source. Without this information, it is impossible for a photofinisher to control effectively its costs of production, and to quality-control proce-

dures to allow it to compete in the wholesale photofinishing trade. Finally, defendant exclusively controls technical knowledge about the several major changes it has made within the past five years to its film, photographic paper and chemistry and in its photofinishing procedures.

43. Plaintiff is and has been an authorized Kodak dealer and photofinisher since 1972 until the present. During this period, plaintiff purchased from defendant over $250,000.00 in film, photographic paper and chemistry to be printed and print processed into photographic prints for resale. Plaintiff is in direct competition in the resale of these commodities with defendant and other purchasers of defendant's commodities.

44. To produce these photographic prints, plaintiff also purchased photo-printing equipment from defendant, including Kodak color printers, enlargers, attachments and lenses. The photographic prints, composed of defendant's photographic paper and chemistry and printed and print processed with defendant's photo-printing equipment, are resold by plaintiff.

45. Sometime prior to March 19, 1972, defendant secretly developed a new series of 110 Kodak Pocket Instamatic cameras, 110 Kodacolor II film, 110 Kodacolor II film photofinishing services, 110 Kodacolor II printing equipment and C-41 chemicals for the processing of 110 Kodacolor II film. This new series of cameras utilized a new size film cartridge designated "110." The 110 film size has a smaller negative format than any other film size previously mass-marketed for the amateur photographic market. "Kodacolor II" is the only film available for use in this new series of cameras.

46. On or about March 19, 1972, defendant introduced this new series of cameras, film, photofinishing services, printing, print processing equipment, and chemicals to authorized Kodak dealers and other independent photofinishers. Thereafter, defendant promoted the 110 Kodak Pocket Instamatic cameras, 110 Kodacolor II film and 110 Kodacolor II photofinishing services to the public through a massive advertising campaign.

SIXTH CLAIM FOR RELIEF

Trade and Commerce

47. Plaintiff incorporates by reference herein the allegations contained in Paragraphs 11, 14 and 15 of the FIRST CLAIM FOR RELIEF; Paragraphs 17, 18, 19 and 22 of the SECOND CLAIM FOR RELIEF; Paragraphs 24 and 27 of the THIRD CLAIM FOR RELIEF; Paragraphs 29 and 32 of the FOURTH CLAIM FOR RELIEF; and Paragraphs 34, 35 and 38 of the FIFTH CLAIM FOR RELIEF, and Paragraphs 40 through 46 against the defendant.

48. From at least 1972, and continuing thereafter until the present, defendant has maintained a sixty-day (60) contractual delivery schedule on photofinishing equipment sales to all its customers except plaintiff. Photofinishing equipment sales to plaintiff were contemporaneous with similar sales made by defendant to plaintiff's competitors, and they involved photofinishing equipment of similar grade and quality.

49. In addition, from at least 1972, and continuing thereafter until the present, defendant has offered technical assistance and services to photofinishers who purchase Kodak commodities for resale, such as film, paper and chemistry. Defendant's employees work in a purchaser's plant and train the purchaser's employees about the handling characteristics of defendant's commodities, and about the photofinishing procedures necessary to produce high quality prints with defendant's commodities at competitive prices.

50. The technical assistance and services offered are:

(a) in the conversion of existing photofinishing equipment to enable photofinishers to utilize defendant's new photofinishing methods and commodities;

(b) in the conversion of existing photofinishers' facilities to enable them to photofinish defendant's new 110 Kodacolor II film at a standard of high quality; and

(c) in the handling characteristics and photofinishing proce-

dures involved in the use of defendant's 110 Kodacolor II film, C-41 chemistry, Ektacolor 30 and 37 papers and Ektaprint 3 chemistry.

Violations

51. This claim for relief involves defendant's violations of Section 2(e) of the Clayton Act, as amended by the Robinson-Patman Act [(15 U.S.C. §13(e)]. It is commenced by plaintiff individually under Sections 4 and 15 of the Clayton Act (15 U.S.C. §§15 and 26) to recover treble damages for and injunctive relief from defendant's violations.

52. From or about July 20, 1972, and continuing thereafter until on or about September 15, 1974, defendant has discriminated against plaintiff in services connected with the processing, handling, sale and offering for sale of defendant's commodities, which are purchased for resale by plaintiff, by refusing and failing to deliver plaintiff's photofinishing equipment orders within the same sixty-day (60) delivery schedule that is given to plaintiff's competitors.

53. From on or about August 15, 1972, and continuing thereafter until the present, defendant has discriminated against plaintiff in services connected with the processing, handling, sale and offering for sale of defendant's commodities, which are purchased for resale by plaintiff, by providing technical assistance and services to all purchasers of defendant's commodities except plaintiff. Defendant's refusal and failure to provide technical assistance and services to plaintiff in the conversion of plaintiff's photofinishing equipment and plant, and in the handling characteristics of and photofinishing procedures for defendant's commodities, has increased plaintiff's operating costs above, and decreased the standard of plaintiff's photofinishing below, those of plaintiff's competitors.

Effects Of The Violations Alleged

54. The effects of defendant's violations are as follows:

(a) plaintiff has been deprived of the opportunity to compete with other photofinishers, including defendant, in the photofinishing of defendant's Kodacolor II film;

(b) only plaintiff was unable to photofinish defendant's 110 Kodacolor II film, 8-inch by 10-inch enlargements, and all sizes of borderless prints until defendant delivered said equipment;

(c) plaintiff has suffered increased costs of doing business and its standard of quality has fallen below that of plaintiff's competitors, which include defendant; and

(d) competition in the photofinishing trade by plaintiff has been lessened, restrained and eliminated.

SEVENTH CLAIM FOR RELIEF

Trade And Commerce

55. Plaintiff incorporates by reference herein the allegations contained in Paragraphs 40, 41, 42, 43, 44, 45 and 46 of the SIXTH CLAIM FOR RELIEF against the defendant.

56. Until defendant introduced its new series of 110 camera and Kodacolor II film on or about March 19, 1972, defendant was marketing another line of instamatic cameras that used 126 size film and Kodacolor X type film. This size and type of film was processed in chemical solutions known as C-22. Prior to the introduction of the 110 camera and Kodacolor II film, there were several large manufacturers selling and distributing a compatible line of cameras and film of the 126 type, and that film was compatible with the then existing C-22 processing chemicals.

57. Because defendant's new 110 camera line used a different size and type of film only defendant was able to manufacture this new size and type of film.

58. On or about May 1, 1973, defendant discontinued all its film size in Kodacolor X and replaced it with the new Kodacolor II film. This new film was not compatible with any of the then existing film processing procedures or chemical solutions. New

equipment and new chemical types had to be purchased to allow plaintiff to develop the new film. Consequently the photofinisher's film processing equipment and a large supply of existing chemicals became obsolete as a result of the film changeover. The new chemicals needed to process the Kodacolor II film is known as "C-41." In addition to having to purchase the new chemistry, plaintiff had to purchase new film processing equipment.

59. On or about September 1, 1973, defendant discontinued the manufacture of its then existing Ektacolor 20 paper and its Ektaprint C chemistry. Ektacolor 20 paper and Ektaprint C chemistry was compatible with other manufacturers' paper and chemistry. Defendant replaced its Ektacolor 20 paper with Ektacolor 30 and 37 papers, and it replaced its Ektaprint C chemistry with Ektaprint 3 chemistry. Because defendant's replacement papers were not compatible with the then existing Ektaprint C chemistry, and because defendant's replacement Ektaprint 3 chemistry was not compatible with the then existing Ektacolor 20 paper, plaintiff was required to discard its complete inventory of the old paper and chemistry and purchase the new Ektacolor 30 and 37 replacement papers and Ektaprint 3 chemistry. Because the new Ektaprint 3 processing procedures were not compatible with the existing procedures, plaintiff was forced to modify its equipment or purchase new equipment.

At the time plaintiff introduced this new line of paper and chemistry, no other company manufactured or sold products compatible with the Ektacolor 30 or 37 papers or the Ektaprint 3 chemistry.

Class Action Allegations

60. Plaintiff asserts this claim for relief on its own behalf and as a class action on behalf of all other photofinishers similarly situated in accordance with the provisions of Rule 23 (a) and (b) (3) of the *Federal Rules of Civil Procedure*.

61. The class for which this claim for relief is brought consists of all photofinishers located throughout the United States who have been required by defendant to purchase one or more

Kodak photographic products directly from defendant whenever they purchased one or more other Kodak photographic products directly from defendant.

62. The members of the class described herein are so numerous as to make it impractical to join all members as plaintiffs.

63. Because the members of the class have been injured by the same acts and practices of defendant, common questions of law and fact abound among all class members and plaintiff.

64. The claims of plaintiff are typical of the claims of all class members.

65. The interests of the class members will be protected fairly and adequately by plaintiff.

66. In addition, the claims of plaintiff and all class members involve common questions of law and fact that predominate over any questions affecting only individual class members and, furthermore, this class action is superior to other methods for the fair and efficient adjudication of the controversy described herein.

Violations

67. This claim for relief involves defendant's violations of Section 3 of the Clayton Act (15 U.S.C. §14) and Section 1 of the Serman Act (15 U.S.C. §1). It is commenced by plaintiff individually and on behalf of all other similarly situated purchasers under Sections 4 and 15 of the Clayton Act (15 U.S.C. §§15 and 26) to recover treble damages for and injunctive relief from defendant's violations.

68. Since 1972, and in the course of interstate commerce, defendant has violated Section 3 of the Clayton Act and Section 1 of the Sherman Act by selling certain photographic commodities to plaintiff on an implied contract, condition, agreement or understanding that plaintiff would purchase other photographic commodities manufactured and sold by defendant.

69. To effectuate this unlawful conduct, defendant has perpetrated certain acts that include, among others, the following:

(a) requiring plaintiff to purchase defendant's C-41 chemistry whenever plaintiff purchased defendant's Kodacolor II film;

(b) requiring plaintiff to purchase defendant's Ektaprint 3 replacement chemistry whenever plaintiff purchased defendant's Ektacolor 30 and/or 37 RC replacement papers;

(c) requiring plaintiff to purchase defendant's Ektacolor 30 and/or 37 RC replacement papers whenever plaintiff purchased defendant's Ektaprint 3 replacement chemistry; and

(d) requiring plaintiff to purchase defendant's 110 Kodacolor II film whenever plaintiff purchased 110 cameras.

Effects Of The Violations Alleged

70. The effects of defendant's violations are the following:

(a) plaintiff was unable to purchase film, chemistry and paper from other sources until the other manufacturers retooled and were licensed by defendant;

(b) plaintiff's costs of film, chemistry and paper were increased by 10 to 40 percent for all film, chemistry and paper that previously were purchased from defendant's competitors;

(c) plaintiff was forced to purchase and modify film and print processing equipment;

(d) plaintiff had to discard all existing inventories of paper and chemistry at the time it converted to the new products manufactured by defendant;

(e) plaintiff had to purchase C-41 chemistry when it purchased Kodacolor II film from defendant; and

(f) plaintiff had to purchase Ektaprint 3 chemistry whenever it purchased Ektacolor 30 or 37 paper from the defendant.

EIGHTH CLAIM FOR RELIEF

Trade And Commerce

71. Plaintiff incorporates by reference herein the allegations contained in Paragraphs 55 through 66 of the SEVENTH CLAIM FOR RELIEF against the defendant.

72. Since World War II, Defendant has dominated the amateur photographic market by continually researching and developing new photographic products and, thereafter, by waging massive advertising campaigns to create a substantial demand for these new products by amateur photographers. While defendant continually develops new photographic products, plaintiff is informed and believes that defendant refrains from introducing them until such time as its market position is endangered. Plaintiff is informed and believes that it is only when defendant's share of the amateur photographic market slips from 90 percent or more to less than 70 percent that defendant introduces and creates a demand for a new photographic product. In so doing, defendant renders obsolete existing competitive products, and it regains and controls the dominant share of the amateur photographic market.

Violations

73. This claim for relief involves defendant's violations of Section 2 of the Sherman Act (15 U.S.C. §2). It is commenced by plaintiff individually and on behalf of all other similarly situated purchasers under Sections 4 and 15 of the Clayton Act (15 U.S.C. §§15 and 26) to recover treble damages for and to obtain injunctive relief from defendant's violations.

74. Since a time presently unknown to plaintiff, but at least as early as 1972, defendant has attempted to monopolize and monopolized the manufacture and sale of film, and photographic paper and chemistry in the United States' amateur photographic market in violation of Section 2 of the Sherman Act.

75. In attempting to monopolize, and monopolizing the amateur photographic market, defendant has perpetrated certain acts that include, among others, the following:

(a) developing new photographic products and photofinishing equipment that are incompatible with then existing photographic products and photofinishing equipment;

(b) developing and withholding new photographic products and photofinishing equipment from the amateur photographic market until competition from other manufacturers forces the introduction of these products and equipment;

(c) developing and marketing its 110 series of instamatic cameras, Kodacolor II film, paper and chemistry in such a manner that plaintiff was required to purchase new paper, chemistry and photofinishing equipment to enable it to photofinish 110 size film and Kodacolor II film;

(d) requiring plaintiff to purchase defendant's C-41 chemistry whenever plaintiff purchases defendant's 110 Kodacolor II film;

(e) requiring plaintiff to purchase defendant's Ektaprint 3 replacement chemistry whenever plaintiff purchased defendant's Ektacolor 30 and/or 37 RC replacement papers; and

(f) requiring plaintiff to purchase defendant's Ektacolor 30 and/or 37 RC replacement papers whenever plaintiff purchased defendant's Ektaprint 3 replacement chemistry.

Effects Of The Violations Alleged

76. The effects of defendant's violations are the following:

(a) defendant has obtained the dominant share of the amateur photographic market;

(b) defendant has secured the power to control prices and to exclude and foreclose actual and potential competition in the amateur photographic market;

(c) defendant has exercised such power by excluding, fore-

closing and suppressing competition from plaintiff and other photofinishers because:

(1) plaintiff and others have been forced unnecessarily to purchase new photographic products and new photofinishing equipment, to convert or modify existing photofinishing equipment, and to discard existing inventories of film, paper and chemistry;

(2) since the mid-1950's, defendant's actions have eliminated many independent photofinishers servicing the amateur photographic market;

(3) other companies manufacturing products compatible with defendant's commodities have been required to retool their plants, develop new production procedures, and secure licenses from defendant, all of which increase the selling price of their products to plaintiff and others; and

(4) other companies manufacturing products compatible with defendant's commodities have been eliminated from producing items in competition with defendant.

NINTH CLAIM FOR RELIEF

Trade And Commerce

77. Plaintiff incorporates by reference herein the allegations contained in Paragraphs 40, 41, 42, 43 and 44 of the Complaint against the defendant.

78. From at least 1972 and continuing until the present the defendant has offered price reductions on the sale of its color photographic paper on proportionately equal terms to all of its customers except plaintiff. The plaintiff is informed and believes these price reductions amounted to 12% of the sales price of the color photographic paper sold by defendant. The color photographic paper involved in this price reduction was sold in interstate commerce for resale by defendant's customers and was of similar

quality and grade. The purchasers of defendants commodities were in competition with plaintiff for the resale of the commodities involved in the price reduction.

79. The price reduction given by the defendant to other purchasers of its commodities was in the form of a cash rebate based upon the total sales price of the color photographic paper.

Violation

80. This claim for relief involves defendants violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act [(15 U.S.C. § 13(a)]. It is commenced by plaintiff individually under Sections 4 and 15 of the Clayton Act (15 U.S.C. § 15 and 26) to recover treble damages for and injunctive relief from defendants violation.

81. Since a time presently unknown to plaintiff, but at least as early as 1972, the defendant has discriminated against the plaintiff by offering price reductions to its other customers in competition with the plaintiff, while refusing to offer the same price reductions to the plaintiff on a proportionately equal basis. This price discrimination occurred as follows:

(a) the defendant offered to its customers, other than plaintiff, a 12% price reduction on the sale of a six months supply of color photographic paper ordered in advance;

(b) the defendant allowed all of its other customers, except plaintiff, to accept delivery of the color photographic paper in six deliveries during the six month period covered by the order;

(c) the defendant allowed all of it's other customers, except the plaintiff, to pay for the color photographic paper when it was delivered;

(d) the defendant refused to allow plaintiff to receive the order of color photographic paper in six deliveries during the six month period and to pay for the color photographic paper when delivered;

(e) the terms offered to the plaintiff by the defendant to allow it to participate in the price reduction was to accept a six months supply of paper to be delivered in a single shipment and a single payment for the entire six months order; and

(f) this would have forced the plaintiff to warehouse a six months supply of paper and pay six months in advance of its use while the defendant provided warehouse facilities for its other customers and allowed those other customers to pay for the color photographic paper as they used it.

Effects Of The Violations Alleged

82. The effects of the defendants violation are as follows:

(a) Plaintiff has been deprived of the opportunity to purchase defendants commodities on terms of sale that are proportionately equal to all competing customers of the defendant;

(b) plaintiff has sustained increased cost of doing business; and

(c) competition by plaintiff in the photofinishing trade has been lessened, restrained and eliminated.

INJURIES SUSTAINED

83. For the SIXTH, SEVENTH, EIGHTH and NINTH CLAIMS FOR RELIEF, plaintiff has been unable to compete on a fair basis with other photofinishers, plaintiff's business reputation has been damaged and destroyed, plaintiff has suffered a monetary loss in materials, labor and profits, and plaintiff has been forced to increase in its costs of doing business to the point where it has lost over 90 percent of its wholesale photofinishing business. By reason of the aforedescribed facts alleged, plaintiff asserts that it has sustained monetary damage in an undetermined sum.

FRAUDULENT CONCEALMENT

84. For the SIXTH, SEVENTH, EIGHTH and NINTH CLAIMS FOR RELIEF, plaintiff asserts the tolling of any applicable statute of limitations and, as grounds therefor, it states that defendant has acted to conceal, and has succeeded in concealing, the illegal acts previously alleged herein. By virtue of such fraudulent concealment, plaintiff had no knowledge of these illegal acts earlier than four years prior to the institution of this action.

WHEREFORE, plaintiff prays for the following:

FIRST CLAIM FOR RELIEF:

1. $50,000 as compensatory damages;
2. Costs of litigation;
3. Reasonable attorney's fees; and
4. Further relief as may be deemed proper by this Court.

SECOND CLAIM FOR RELIEF:

1. $15,000.00 as compensatory damages;
2. Costs of litigation;
3. Reasonable attorney's fees; and
4. Further relief as may be deemed proper by this Court.

THIRD CLAIM FOR RELIEF:

1. $100,000.00 as compensatory damages;
2. Costs of litigation;
3. Reasonable attorney's fees; and
4. Further relief as may be deemed proper by this Court.

FOURTH CLAIM FOR RELIEF:

1. $250,000.00 as compensatory damages;
2. Costs of litigation;
3. Reasonable attorney's fees; and
4. Further relief as may be deemed proper by this Court.

FIFTH CLAIM FOR RELIEF:

1. $500,000.00 as compensatory damages;

2. Costs of litigation;

3. Reasonable attorney's fees; and

4. Further relief as may be deemed proper by this Court.

SIXTH CLAIM FOR RELIEF:

1. Treble the compensatory damages determined by this Court to have been sustained by plaintiff;

2. That any defendant be enjoined from engaging in any further illegal activity that has the practical effect of discriminating against plaintiff;

3. Costs of litigation;

4. Reasonable attorney's fees; and

5. Further relief as may be deemed proper by this Court.

SEVENTH CLAIM FOR RELIEF:

1. That this claim for relief be designated and authorized to proceed as a class action pursuant to Rule 23(b)(3) of the *Federal Rules of Civil Procedure;*

2. Treble the compensatory damages determined by this Court to have been sustained respectively by plaintiff and by each member of the class;

3. That defendant be enjoined from engaging in any further illegal activity that has the practical effect of requiring plaintiff and the members of its class to purchase one or more photographic products directly from defendant on the implied condition, understanding or agreement that they will purchase one or more other photographic products directly from defendant;

4. Costs of litigation;

5. Reasonable attorney's fees; and

6. Further relief as may be deemed proper by this Court.

EIGHTH CLAIM FOR RELIEF:

1. That this claim for relief be designated and authorized to proceed as a class action pursuant to Rule 23(b)(3) of the *Federal Rules of Civil Procedure;*

2. Treble the compensatory damages determined by this Court to have been sustained respectively by plaintiff and by each member of the class;

3. That defendant be enjoined from engaging in any further illegal activity that would have the practical effect of attempting to monopolize and/or monopolizing the amateur photographic market;

4. Costs of litigation;

5. Reasonable attorney's fees; and

6. Further relief as may be deemed proper by this Court.

NINTH CLAIM FOR RELIEF:

1. Treble the compensatory damages determined by this Court to have been sustained by plaintiff;

2. That defendant be enjoined from engaging in any further illegal activity that has the practical effect of discriminating against plaintiff;

3. Costs of litigation;

4. Reasonable attorney's fees; and

5. Further relief as may be deemed proper by this Court.

DATED: October 21, 1977

/s/ ROBERT C. FORTUNE

Robert C. Fortune
Attorney at Law
100 Oceangate, Suite 1200
Long Beach, California 90802
(213) 435-2427
Attorney for Plaintiff

PLEASE TAKE NOTICE that, pursuant to Rule 38(b) of the *Federal Rules of Civil Procedure,* plaintiff FOREMOST PRO COLOR, INC. hereby demands a jury trial on all issues triable of right by a jury.

DATED: October 21, 1977.

/s/ ROBERT C. FORTUNE

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Long Beach, California 90802
(213) 435-2427
Attorney for Plaintiff

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No. 82-1876

IN THE

Supreme Court of the United States

October Term, 1983

Foremost Pro Color, Inc.,

Petitioner,

vs.

Eastman Kodak Company,

Respondent.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the Ninth Circuit Court of Appeals render a decision in conflict with the decision of another federal circuit court of appeals in determining whether petitioner's averments that respondent introduced technologically interrelated products, absent any alleged coercive associated conduct, stated a claim for relief either for a *per se* illegal tying arrangement under Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 3 of the Clayton Act, 15 U.S.C. § 14, or for attempted monopolization or monopolization under Section 2 of the Sherman Act, 15 U.S.C. § 2?

2. Did the Ninth Circuit Court of Appeals depart from the accepted and usual course of judicial proceedings in determining whether petitioner's averments that respondent (1) failed to make timely deliveries and (2) failed to provide technical services with respect to equipment purchased *but not resold* stated a claim for price discrimination in connection with a "commodity bought for resale" under Section 2(e) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(e)?

3. Did the Ninth Circuit Court of Appeals depart from the accepted and usual course of judicial proceedings in determining whether petitioner's averments that it was not "offered" the same payment terms as "offered" to its competitors, absent any averment that the alleged price discrimination "may substantially lessen competition," stated a claim for relief under Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a)?

The following information is provided pursuant to this Court's Rule 28.1. Only respondent Eastman Kodak Company has a direct interest in the outcome of this case. All subsidiaries are wholly-owned; neither the stock nor debt of any is publicly traded.

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For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 703 F.2d 534, and is set forth in Appendix A to Petition ("App. A").

COUNTERSTATEMENT OF THE CASE*

Petitioner Foremost Pro Color, Inc. ("Foremost") is an authorized Kodak dealer and an independent photofinisher engaged in developing and printing photographic

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* Petitioner's "Statement of the Case" is replete with information not contained in the record, which explains why it is devoid of citations either to that record or to the opinion below. It makes no attempt to apprise the Court of the proceedings to date, and in fact bears little relationship to the case. For these reasons, it cannot be relied upon in determining whether to grant the writ.

negatives. As a dealer, Foremost has purchased Kodak film, paper and chemicals for retail marketing. As a photofinisher, Foremost has purchased photofinishing equipment, paper and chemicals from Kodak for use in rendering photofinishing services to its customers. 703 F.2d at 537; App. A at 2.

Foremost's Petition is the coda to its many diffuse attempts to enlarge simple state law contract claims into "major" antitrust litigation. Foremost filed this action in 1976 with the manifest hope of trailing in the wake of the case which ultimately resulted in the decision in *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), *cert. denied,* 444 U.S. 1093 (1980) ("*Berkey*"). Similar to *Berkey,* this litigation arises out of Kodak's introduction in 1972 of its then newest line of cameras, the 110 "pocket instamatic," and related technologically compatible products. *See id.* at 276-78. In relevant part, *Berkey* held that Kodak did not monopolize or attempt to monopolize any relevant market by failing to predisclose to its competitors the new 110 technology or by "system selling" the 110 camera and new film. *Id.* at 279-88. Foremost's various assertions that the opinion in this case conflicts with *Berkey,* obviously made in the hope of attracting the Court's attention, are flatly wrong.

This case arrives at the Court's doorstep following four unsuccessful attempts by Foremost to draft a complaint setting forth *prima facie* claims for antitrust violations. The original complaint averred five contract and three antitrust claims. Foremost voluntarily dismissed one antitrust claim, and the district court dismissed the remaining two for failure to state claims for relief. 703 F.2d at 539 n.1; App. A at 7 n.1.

The first amended complaint restated the five contract claims and the two previously dismissed antitrust claims, and added three new antitrust claims. The district court

dismissed all of the antitrust claims for failure to state claims for relief, and accordingly did not rule on an alternative motion for summary judgment on those claims. The second amended complaint repeated the five contract claims and appended six antitrust claims. Once again the district court dismissed the antitrust claims and thus did not rule on Kodak's alternative summary judgment motion. *Id.*

Foremost then filed a third amended complaint ("complaint") containing the contract claims (Claims 1-5), and this time, four antitrust claims (Claims 6-9). *See* Appendix E to Petition ("App. E"). The seventh and eighth claims for relief averred that Kodak's introduction of the 110 technologically related system of products constituted a tying arrangement in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 3 of the Clayton Act, 15 U.S.C. § 14, and an attempt to monopolize and monopolization in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. The sixth and ninth claims averred that Kodak violated the price discrimination prohibitions of Sections 2(a) and 2(e) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. 13(a) and (e), by failing to make timely deliveries on equipment orders, by failing to provide technical services and by failing to offer certain payment terms purportedly enjoyed by Foremost's competitors.

The district court determined that the sixth, seventh and eighth claims were identical to those dismissed previously and hence dismissed them without leave to amend. Kodak's alternative summary judgment motion was thereby mooted. The remaining ninth claim, pleaded for the first time, was dismissed with leave to amend but Foremost declined to do so. After Kodak won summary judgment on four of the five remaining contract claims, Foremost voluntarily dismissed its final contract claim and prompted the trial court to enter judgment in Kodak's favor. *Id.*; Appendix B to Petition 1-6.

The Ninth Circuit Court of Appeals unanimously affirmed both dismissal of the antitrust claims and summary judgment on the contract claims. Although the petition does not challenge the affirmance of summary judgment on the contract claims, that affirmance is notable insofar as the charging factual averments of the contract claims were identical to those supporting the sixth claim for relief. See App. E at 11. The Court of Appeals' opinion conflicts with none of this Court's opinions nor with any other federal court opinion, specifically including *Berkey,* and reflects no departure whatsoever from the accepted and usual course of judicial proceedings. *See* Sup. Ct. R. 17.1.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT WITH *BERKEY*.

The Court of Appeals' determination that Foremost's complaint did not state a claim under the Sherman Act in no way conflicts with *Berkey.* First, as to Foremost's Section 1 tying claim, no such claim was decided in *Berkey. Berkey, supra,* 602 F.2d at 299-305. Second, as to Foremost's Section 2 attempt to monopolize and monopolization claim, *Berkey* in fact vindicated Kodak's introduction of the 110 system of products. *Id.* at 279-292. *Berkey* did not, as Foremost states (Petition at 10-13), hold that Kodak violated Section 2 by using monopoly power in film to control markets in papers, chemicals or photofinishing equipment. *Id.* In any event, Foremost's complaint did not distinguish among the markets comprising the alleged "amateur photographic market," and thus raised no issue whether Kodak attempted to leverage monopoly power in film in order to control any other market. App. E at 17-19; 703 F.2d at 544; App. A at 15. *Compare Berkey, supra,* 603 F.2d at 268-71; *GAF Corp. v. Eastman Kodak Co.,* 519 F. Supp. 1203, 1209 (S.D.N.Y.

1981) ("*GAF*"). The Court of Appeals, which in fact relied heavily on the *Berkey* opinion, correctly decided that Foremost had not stated a Sherman Act claim.*

A. The Uncoerced Sale Of Technologically Compatible New Products Does Not Constitute A *Per Se* Illegal Tying Arrangement, And Foremost Thus Did Not State A Claim Under Section 1 Of The Sherman Act.

Foremost's seventh claim attempted to plead a tying arrangement in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 3 of the Clayton Act, 15 U.S.C. § 14. App. E at 13-16. Foremost asserted that it was "required" to purchase Kodak's new compatible film whenever it purchased Kodak's new 110 cameras (*id.* at 14), and that it was "required" to purchase new compatible chemical products whenever it purchased the new film and compatible paper products (*id.* at 14-16). Foremost was allegedly "required" to purchase the 110 components as a package because the new film could not be processed with existing technology, and hence the new supporting products were necessary to meet consumer demand for 110 cameras and the processing of 110 film photofinishing orders. *Id.*; 703 F.2d at 534-35, 541; App. A at 6-7, 10.

The Court of Appeals held that Foremost did not aver the requisite "coercion" and hence did not state a claim for a *per se* Section 1 violation. 703 F.2d at 542-43; App. A at 12. The opinion follows well-established law and plows no new ground justifying granting of the writ. The decision hardly conflicts with *Berkey* given that no tying claim was decided in that case.

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* Foremost's suggestion (Petition at 10) that the Court of Appeals did not construe the complaint so "as to do substantial justice" as required by Rule 8(f) of the Federal Rules of Civil Procedure is thoroughly belied by even a casual reading of the opinion. The Court of Appeals gave full weight to the complaint's averments, as Foremost itself interpreted them in its written and oral arguments.

This Court has held that coercion by the seller is an important element of a *per se* illegal tying claim. *See, e.g., Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5-6, 10 (1958). As the Court noted in *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 614 (1953),

> "[t]he common case of the adjudicated unlawful tying arrangement is the *forced* purchase of a second distinct commodity with the desired purchase of the dominant 'tying' product . . . ." (Emphasis added.)

See also Yentsch v. Texaco, Inc., 630 F.2d 46, 56-57 (2d Cir. 1980); *Ogden Food Service Corp. v. Mitchell*, 614 F.2d 1001, 1002-03 (5th Cir. 1980); *Ungar v. Dunkin' Donuts of America, Inc.*, 531 F.2d 1211, 1218-19 (3d Cir.), *cert. denied*, 429 U.S. 823 (1976).

Foremost pointedly refrained from averring that Kodak "*forced* the purchase of a second distinct commodity with the desired purchase of . . . [a] dominant 'tying' product." There was no averment that Kodak conditioned the sale of any product on the purchase of another. Nor did Foremost allege that Kodak's dominant purpose in designing and introducing the 110 system was to compel purchase of the entire system as a package, as opposed to achieving the legitimate goal of introducing technologically advanced products developed to satisfy consumer demand for pocket-size cameras. While Foremost averred that the purchase of the tied products was "required," that word alone is not sufficient to support even an inference of the necessary coercion. 703 F.2d at 541; App. A at 10. *See, e.g., Sargent-Welch Scientific Co. v. Ventron Corp.*, 567 F.2d 701, 708-09 (7th Cir. 1977), *cert. denied*, 439 U.S. 822 (1978). Moreover, Foremost itself interpreted its claim to mean simply that whenever it "purchased one Kodak product, it necessarily had to purchase additional Kodak commodities." Petition at 12; 703 F.2d at 540; App. A at 7. Thus,

the Court of Appeals correctly stated that "Foremost's tying claim alleged only the introduction of technologically related components incompatible with existing products offered by the competition." 703 F.2d at 543; App. A at 12. Foremost therefore plainly failed to aver the coercion essential to a *per se* unlawful tying arrangement.

Lacking any averment that Kodak "coerced" or "forced" the purchase of any tied product, Foremost's claim basically involved a so-called technological tie. The Second Circuit rejected an analogous Section 2 monopolization claim of "system selling" in *Berkey, supra,* 603 F.2d at 285-88. *See also Response of Carolina, Inc. v. Leasco Response, Inc.*, 537 F.2d 1307, 1326-31 (5th Cir. 1976) (rejecting the technological tie theory in the context of computer products). As the Court of Appeals noted in this case, placing technologically compatible product offerings in the *per se* illegal category would run directly contrary to the purpose of the antitrust laws:

> "Indeed, such a rule could become a roadblock to the competition vital for an ever expanding and improving economy. Product innovation, particularly in such technologically advancing industries as the photographic industry, is in many cases the essence of competitive conduct. Therefore, we decline to place such technological ties in the category of economic restrictions deemed *per se* unlawful by *Northern Pacific* and its progeny."

703 F.2d at 542; App. A at 11. *See Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49-51 & 50 n.16 (1977).

The precise holding of the Court of Appeals is "that the development and introduction of a system of technologically interrelated products is not sufficient alone to establish a *per se* unlawful tying arrangement even if the new products are incompatible with the products

then offered by the competition and effective use of any one of the new products necessitates purchase of some or all of the others." 703 F.2d at 542-43; App. A at 12. The holding is perfectly consistent with the line of cases originating with *Northern Pacific,* and notably Foremost does not argue to the contrary. Petition at 12.

Foremost complains only that the Court of Appeals failed to apply a rule of reason analysis in assessing the viability of its tying claim. Petition at 12. Foremost, however, never raised this issue on appeal. *See* Appellant's Opening Brief at 11-23; Appellant's Reply Brief at 4-10. As the Court of Appeals noted, "Foremost has not challenged the alleged tying arrangement under the rule of reason. Thus, the dispositive question before us is whether, under the *per se* rule, Foremost adequately pleaded the requisite coercion in its Complaint." 703 F.2d at 541; App. A at 9.

B. Foremost's Averments That Kodak Delayed Introduction Of New Technology Products Did Not State A Claim For Monopolization Or Attempted Monopolization.

In its eighth claim, which incorporated the tying claim discussed above, Foremost attempted to plead that Kodak had monopolized and attempted to monopolize in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. App. E at 17-19; 703 F.2d at 543-46; App. A at 12-17. Kodak allegedly dominated the "amateur photographic market" as a result of its "continually researching and developing new photographic products," "refrain[ing] from introducing them until its market position is endangered," and "render[ing] obsolete existing competitive products." App. E at 17-18. *See* 703 F.2d at 543; App. A at 12. The specific predatory acts averred included developing the new 110 products which were incompatible with then existing products and equipment, withholding those prod-

ucts until competition forced their market introduction, and developing and marketing the 110 system in such a manner so as to require Foremost to purchase new paper, chemistry and equipment in order to photofinish Kodak's new film. *Id.* As such, the eighth claim launched a broadside attack on the very process of innovation and competition which the antitrust laws were designed to protect and foster. *See United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295, 344 (D. Mass. 1953), *aff'd,* 347 U.S. 521 (1954) (per curiam). The Second Circuit affirmed the legality of Kodak's introduction and marketing of the 110 system in *Berkey, supra,* 603 F.2d at 278-86. *See also GAF, supra*, 519 F. Supp. at 1225-29.

Foremost's Petition characterizes the issue as "whether the Ninth Circuit correctly held that Kodak's use of its monopoly power in one area of the marketplace to control a secondary market is not a violation of the antitrust laws, while the identical issue was held to be a violation by the Second Circuit in *Berkey* . . ." Petition at 10. That assertion thoroughly mischaracterizes Foremost's complaint, the holding of the Second Circuit in *Berkey* and the holding of the Court of Appeals in this case.

In contrast to *Berkey,* Foremost did not attempt to state a claim on the ground that Kodak failed to "predisclose" its 110 system format to its competitors in willful maintenance of monopoly power or as anticompetitive conduct in furtherance of an attempt to monopolize. *See Berkey,* supra, 603 F.2d at 279-285 (holding that Kodak had no disclosure duty); *GAF, supra,* 519 F. Supp. at 1228-29 (same). More importantly, Foremost's complaint did not distinguish among the variety of product markets comprising the "amateur photographic market." *See Berkey, supra,* 603 F.2d at 268-71; *GAF, supra,* 719 F. Supp. at 1209. Thus, as the Court of Appeals specifically noted, there was simply "no occasion to address whether Foremost's complaint stated a valid

claim for relief on the ground that Kodak abused its monopoly power in the film market or used that power as a lever to create, or attempt to create, a monopoly in the markets for amateur still cameras or photographic chemicals or papers." 703 F.2d at 544; App. A at 15. *See Berkey, supra,* 603 F.2d at 268-71, 275-92.

The Court of Appeals affirmed dismissal of Foremost's eighth claim because it failed to aver facts that would *prima facie* establish the conduct element of a Section 2 offense, namely, the willful acquisition or maintenance of monopoly power in a relevant market. *See United States v. Grinnell Corp.,* 384 U.S. 563, 570-71 (1966); *Berkey, supra,* 603 F.2d 274-75. Four of the six acts that allegedly constituted an attempt to monopolize and monopolization of the "amateur photographic market" were simply repeats of the tying averments set forth in the seventh claim for relief. 703 F.2d at 544; App. A at 14. Because the introduction of technologically related products is, absent associated coercive conduct, neither predatory nor anticompetitive, Foremost's tying allegations obviously were "insufficient to aver the requisite willful acquisition or maintenance element of a monopolization claim or the anticompetitive or predatory conduct element of an attempted monopolization claim." *Id. See Berkey, supra,* 603 F.2d at 275-76, 285-88.

The remaining two anticompetitive acts Foremost asserted were (1) that the new 110 products were not compatible with existing non-Kodak photographic products, and (2) that Kodak did not announce and market the 110 system "until competition from other manufacturers force[d] the introduction" of the system. App. E at 18. The Court of Appeals held that neither of these averments was sufficient to satisfy the conduct element of Section 2. 703 F.2d at 544; App. A at 15.

In so holding, the Court of Appeals' opinion accords with *Berkey,* and indeed relies heavily upon the Second

Circuit's opinion. *Berkey* held that as a general rule "any firm, even a monopolist, may . . . bring its products to market whenever and however it chooses." *Berkey, supra,* 603 F.2d at 286 (footnote omitted). The Court of Appeals agreed with the holding in *Berkey* that, absent associated predatory conduct, Kodak's purported delay in marketing the 110 system could not support a Section 2 offense:

> ". . . [E]ven a monopolist cannot *exclude* or *restrain* competition in its own market or related markets by delaying the introduction of new, technologically advanced products. In this case, for example, any delay by Kodak in introducing the 110 system could have worked only to the advantage of photofinishers and competing manufacturers. Prior to the introduction of the 110 system, it is obvious that Foremost, along with all other photofinishers, was able to choose among several technologically compatible products offered by Kodak and many of its smaller competitors."

703 F.2d at 545; App. A at 17 (emphasis in original).

The opinion cautions, however, that product introduction is not immune from scrutiny under the antitrust laws. Specifically following *Berkey,* the opinion states that " 'it is not the product introduction itself, but some associated conduct, that supplies the violation.' " 703 F.2d at 545; App. A at 16-17, *quoting, Berkey, supra,* 603 F.2d at 286 n.30. *See also Northeastern Telephone Co. v. American Telephone and Telegraph Co.*, 651 F.2d 76, 93 (2d Cir. 1981) ("*Northeastern Telephone*"). Foremost never averred any "associated conduct," except the mere fact of technological incompatibilities between the 110 products and existing non-Kodak products.

The alleged technological incompatibility between Kodak's 110 system and competitive products cannot,

however, support a claim for technological predation under Section 2. Even assuming Kodak possessed the monopoly power averred, it "had the right to redesign its products to make them more attractive to buyers — whether by reason of lower manufacturing cost and price or improved performance." *California Computer Products, Inc. v. International Business Machines Corp.*, 613 F.2d 727, 744 (9th Cir. 1979). Nor did the antitrust laws impose any duty on Kodak to circumscribe its "product development so as to facilitate sales of rival products." *Id. See also Northeastern Telephone, supra,* 651 F.2d at 93; *ILC Peripherals Leasing Corp. v. International Business Machines Corp.*, 458 F. Supp. 423, 439 (N.D. Cal. 1978), *aff'd sub nom., Memorex Corp. v. International Business Machines Corp.*, 636 F.2d 1188 (9th Cir. 1980) (per curiam), *cert. denied,* 452 U.S. 972 (1981); *Sargent-Welch Scientific Co. v. Ventron Corp., supra,* 567 F.2d 701 at 712. Thus, the case presents no novel or unsettled Section 2 issue requiring the attention of the Court.

II. THE ROBINSON-PATMAN ACT CLAIMS WERE CORRECTLY DISMISSED.

Foremost does not (and cannot) urge that the dismissal of the Robinson-Patman Act claims conflicts with any decision by this Court or by any other federal court of appeals. As discussed below, Foremost's claims were patently defective, and hence correctly dismissed.

A. Foremost Failed To State A Claim For Discrimination In Connection With Commodities "Bought For Resale."

Foremost's sixth claim for relief asserted that Kodak violated Section 2(e) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(e). App. E at 11-13. Section 2(e) prohibits indirect price discrimination against "purchasers of a commodity bought for re-

sale" by furnishing "services or facilities" that are not provided to "all purchasers in proportionately equal terms." 15 U.S.C. § 13(e). Foremost averred that Kodak violated Section 2(e) by (1) failing to deliver on photofinishing equipment orders within the same 60-day schedule maintained for Foremost's competitors, and (2) by failing to provide free technical assistance and services, relating to the conversion of Kodak photofinishing equipment and the handling characteristics of Kodak products, which were provided to Foremost's competitors. App. E at 11-12.

The prohibitions of Section 2(e) apply only to services or facilities connected with the *resale* of the commodity bought by the purchaser. *E.g., Corn Products Refining Co. v. FTC,* 324 U.S. 726, 744 (1945); *Purdy Mobile Homes, Inc. v. Champion Home Builders Co.,* 594 F.2d 1313, 1318 (9th Cir. 1979); *Kirby v. P. R. Mallory & Co.,* Inc., 489 F.2d 904, 910 (7th Cir. 1973), *cert. denied,* 417 U.S. 911 (1974). Foremost did not aver that it resold the photofinishing equipment whose delivery was purportedly delayed. Nor did Foremost aver that it resold the photofinishing equipment as to which Kodak supposedly provided technical assistance only to its other customers. 703 F.2d at 546; App. A at 19; App. E at 11-12. Accordingly, the Court of Appeals correctly determined that "Foremost's failure to allege resale of the photofinishing equipment, the commodities with respect to which the alleged discrimination in deliveries and technical services occurred, is a failure as a matter of law to allege a crucial element of a Section 2(e) violation." 703 F.2d at 546; App. A at 19. In its Petition, as was true in the courts below, "Foremost never comes to grips with this fatal flaw." 703 F.2d at 547; App. A at 19.

B. Foremost Failed To State A Claim For Price Discrimination Because It Averred Neither That The Alleged Discrimination May Substantially Lessen Competition Nor Two Completed Sales To Different Purchasers.

Plaintiff's ninth and final claim attempted to aver price discrimination in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a). App. E at 19-21; 703 F.2d at 547; App. A at 20-22. The charging averments were that Kodak discriminated against Foremost by not "offering" a twelve percent price reduction and deferred payment terms that were offered to Foremost's competitors. The Court of Appeals affirmed dismissal because Foremost averred no facts from which any potential injury to competition could be inferred. 703 F.2d at 547-48; App. A at 21-22.

Section 2(a) specifically provides that price discrimination is unlawful only "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination . . . ." 15 U.S.C. § 13(a). Thus, the language of the statute itself "compels the conclusion that a prima facie claim for unlawful price discrimination cannot be stated absent an allegation that the discrimination in price may produce injury to competition." 703 F.2d at 548; App. A at 21. *See Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 51 U.S.L.W. 4275, 4276 (U.S. March 22, 1983); *Corn Products Refining Co. v. FTC, supra,* 324 U.S. at 738. Because Foremost did not aver that the alleged price discrimination may substantially injure or lessen competition, the Court of Appeals properly concluded that the claim was fatally deficient. "Injury to a competitor is not the test; the test is injury to competition." *Lloyd A. Fry Roofing Co. v. FTC,* 371

F.2d 277, 281 (7th Cir. 1966). *See also M.C. Manufacturing Co. v. Texas Foundries, Inc.*, 517 F.2d 1059, 1067-68 (5th Cir. 1975), *cert. denied*, 424 U.S. 968 (1976). *Cf. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

The ninth claim was defective on an additional ground noted but not relied upon by the Court of Appeals. 703 F.2d at 547; App. A at 20. This Court has determined that a Section 2(a) claim requires at least two completed, contemporaneous sales by the same seller to different purchasers. *Bruce's Juices, Inc. v. American Can. Co.*, 330 U.S. 743, 755 (1947). The language of Section 2(a) requires the so-called "two purchaser rule" because it refers to discrimination "in price between different *purchasers*." 15 U.S.C. § 13(a) (emphasis added). *See, e.g., Carroll v. Protection Maritime Insurance Co.*, 512 F.2d 4, 9 (1st Cir. 1975); *M.C. Manufacturing Co. v. Texas Foundries, Inc., supra*, 517 F.2d at 1065; *Parrish v. Cox*, 586 F.2d 9, 12 n.8 (6th Cir. 1978); *Rutledge v. Electric Hose & Rubber Co.*, 511 F.2d 688, 677 (9th Cir. 1975).

Foremost failed to plead this basic requirement for a Section 2(a) discrimination claim. It averred only that Kodak made "offers" to sell goods on allegedly disparate terms. The averments that Kodak made only "offers" to sell on different terms does not satisfy the requirement of two completed sales. *E.g., Shaw's Inc. v. Wilson-Jones Co.*, 105 F.2d 331, 333 (3rd Cir. 1939); *Chatham Brass Co. v. Honeywell, Inc.*, 512 F. Supp. 108, 113-14 (S.D.N.Y. 1981).

CONCLUSION

For the foregoing reasons, the Court should deny the petition for writ of certiorari.

DATED: June 16, 1983

Respectfully submitted,

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No. 82-1876

In the Supreme Court of the United States

OCTOBER TERM, 1983

FOREMOST PRO COLOR, INC., PETITIONER

v.

EASTMAN KODAK COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the district court properly dismissed petitioner's antitrust claims for failure to state a claim, where the damage to petitioner from alleged "tie-in" and monopolization offenses reflected only the effects of technological innovations by respondent.

2. Whether respondent's alleged discriminatory failure to make prompt delivery of photofinishing equipment and provide related technical services violated Section 2(e) of the Robinson-Patman Act.

3. Whether petitioner's assertion of price discrimination stated a claim under Section 2(a) of the Robinson-Patman Act.

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FOREMOST PRO COLOR, INC., PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A22) is reported at 703 F.2d 534. The judgment and order of the district court dismissing petitioner's federal claims (Pet. App. B1-B6) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 1983. The petition for a writ of

certiorari was filed on May 18, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATUTES INVOLVED

Relevant provisions of Sections 1 and 2 of the Sherman Act (15 U.S.C. 1 and 2), Section 3 of the Clayton Act (15 U.S.C. 14), and Section 2(a) and (e) of the Robinson-Patman Act (15 U.S.C. 13(a) and (e)), are set forth at Pet. App. C1-C5.

STATEMENT

Respondent Eastman Kodak Company manufactures cameras, film, and photographic paper, as well as chemicals and equipment used for developing film (Pet. App. A2). It is also a photofinisher that develops negatives and prints photographs. It enjoys a dominant position in the markets for photographic film and conventional amateur still cameras. In addition, more than 80% of all photofinishing is conducted with Kodak-manufactured photofinishing equipment, photographic paper, and chemicals. *Ibid.*

Petitioner Foremost Pro Color, Inc., is an authorized Kodak dealer and an independent photofinisher. Petitioner has purchased photographic equipment, paper, and chemicals from Kodak for resale to petitioner's customers. It has also purchased photographic equipment, paper, and chemicals from Kodak for use in petitioner's own photofinishing business. Petitioner is thus both a customer and a competitor of Kodak. (*Ibid.*)

1. Petitioner's complaint stems from Kodak's development and introduction in 1972 of a new amateur camera, the 110 "Pocket Instamatic," and related products. The 110 camera used a different size and type of film (Kodacolor II), which required

photofinishers to use new types of paper and processing chemicals and equipment. Pet. App. A2-A3, E10, E13-E14. At the time it introduced the 110 camera and related products, and for a period thereafter, only Kodak manufactured the new film and the products used for processing it.

Petitioner, in its thrice-amended complaint, claimed that Kodak had engaged in illegal tying[1] because its introduction of the 110 system "required" petitioner to buy Kodak's new chemistry whenever it bought the new Kodacolor II film; "required" it to buy the new film whenever petitioner bought the new 110 cameras; and "required" petitioner to buy new chemistry whenever it bought the new type of photographic paper (Pet. App. E15-E16).

Petitioner also alleged (Pet. App. E17-E19) that Kodak had monopolized and attempted to monopolize the "amateur photographic market," in violation of Section 2 of the Sherman Act (15 U.S.C. 2), by "requiring" the tie-ins described above; by developing new products that were incompatible with existing products and equipment; and by withholding new products from the market "until competition from other manufacturers force[d] the introduction of these new products."

In addition, petitioner alleged violation of Section 2(a) and (e) of the Robinson-Patman Act (15 U.S.C. 13(a) and (e)), resulting from (i) Kodak's denying petitioner certain payment terms that Kodak provided petitioner's competitors, and (ii) Kodak's alleged failure to deliver photofinishing equipment to petitioner on the same schedule and with the same

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[1] Petitioner claimed that the tie-ins violated both Section 1 of the Sherman Act (15 U.S.C. 1) and Section 3 of the Clayton Act (15 U.S.C. 14).

services as it provided petitioner's competitors (Pet. App. E11-E13, E19-E21).

The district court dismissed these claims for failure to state a claim on which relief may be granted (Pet. App. B5-B6).[2]

2. The court of appeals unanimously affirmed (Pet. App. A1-A22). It held that petitioner's claim of illegal tying was defective, because "[i]f the buyer is free to take either product by itself, 'there is no tying problem' " (Pet. App. A8, quoting *Northern Pacific Ry.* v. *United States*, 356 U.S. 1, 6 n.4 (1958)). Petitioner did not adequately allege tying, the court found, because it did not claim that Kodak conditioned the purchase of any one of its products on the purchase of any other (Pet. App. A10). The court added that "standing alone," the technological interrelation among complementary products, which is the real basis for petitioner's complaint, is not "sufficient to establish the coercion essential to a *per se* unlawful tying arrangement" (Pet. App. A11).[3] Indeed, since product innovation "is in many cases the essence of competitive conduct[,]" placing so-called "technological ties" in a per se category "could become a roadblock to * * * competition" (*ibid.*).

The court rejected petitioner's Section 2 claims premised on illegal tie-ins for the same reasons it had rejected the tying claims themselves (Pet. App. A14). As to petitioner's complaints that Kodak had violated Section 2 by introducing new products compatible

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[2] The court also granted summary judgment to respondent on a variety of contract claims arising under state law. See Pet. App. A3-A6.

[3] The court of appeals observed that petitioner proceeded under a theory of per se violation, and did not challenge the arrangement under the rule of reason (Pet. App. A9).

with each other but incompatible with competitors' products, and by timing product introduction to maximize profits, the court held that Kodak had the right to redesign its products to make them more attractive to buyers, and that as a general rule even a monopolist may " 'bring its products to market whenever and however it chooses' " (Pet. App. A16-A17, quoting *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 286 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980) (*Berkey*)).[4]

Finally, the court held that petitioner's claim that Kodak had violated Section 2(e) of the Robinson-Patman Act was fatally flawed because it failed to allege "resale" of the products whose delivery was purportedly delayed or with respect to which Kodak failed to provide technical assistance (Pet. App. A18-A20). And it concluded that petitioner's Section 2 (a) allegations concerning discriminatory credit terms were defective because they failed to claim the statutorily required effect on competition, referring instead only to the effect on petitioner (*id.* at A20-A22).

DISCUSSION

The decision of the court of appeals does not conflict with any decision of this Court or of any other court of appeals, is correct, and does not merit further review.

1. Petitioner errs in claiming (Pet. i, 10-13) that the decision below conflicts on the subjects of tying and monopolization with the Second Circuit's decision in *Berkey Photo, Inc.* v. *Eastman Kodak Co., supra.*

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[4] The court stated that other conduct associated with the introduction of a new product might in appropriate cases give rise to Section 2 liability, but noted that no such conduct was alleged in this case (Pet. App. A16-A17).

a. There is no conflict on the Sherman Act Section 1 and Clayton Act Section 3 tying claim, because, as the *Berkey* opinion makes clear, the Second Circuit was not presented with such claims and accordingly did not even discuss, let alone rule on them. *Berkey*, 603 F.2d at 267-268. There is also no conflict with *Berkey* on the Sherman Act Section 2 version of petitioner's tying claim. The Second Circuit did discuss a Section 2 monopolization claim based on alleged "systems selling" of the new 110 camera and film, and that claim is arguably analogous to plaintiff's tying contention concerning systems selling of photofinishing products. But the Second Circuit held that the joint promotion of the two products did not violate Section 2, and thus its ruling is consistent with the comparable holding in favor of Kodak below. See *Berkey*, 603 F.2d at 285-288.

The court of appeals' decision is also consistent with this Court's decisions on tying. The Court has emphasized that "where the buyer is free to take either product by itself there is no tying problem * * *." *Northern Pacific Ry.* v. *United States*, 356 U.S. at 6 n.4; *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 614 (1953). Indeed, Section 3 of the Clayton Act is specific in this regard, for it outlaws only the sale of goods "on the condition * * * that the * * * purchaser thereof shall not use or deal in the goods * * * of a competitor or competitors of the * * * seller * * *."

Petitioner has never claimed that it was not free to buy the various Kodak 110 products separately, or that Kodak as a condition of sale of one of those products required that it purchase others (Pet. App.

A10). Rather, petitioner's contention appears to be that the Court should create a new per se offense of "technological tying" (see Pet. App. A11). The consequence of creating such an offense (whether under the Sherman Act or the Clayton Act) would be flatly to prohibit any firm with substantial market power from introducing a cluster or system of products unless each product was immediately compatible with other existing products.

Such a rule would be a radical and undesirable departure from precedent and from sound economics. Growth or development "as a consequence of a superior product" is not illegal, even for a monopolist. *United States* v. *Grinnell Corp.*, 384 U.S. 563, 571 (1966). Accordingly, monopolists and others with substantial market power do not violate the antitrust laws by introducing useful new products, even though the innovations also disadvantage their competitors.[6]

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[5] See, *e.g.*, *California Computer Products, Inc.* v. *IBM Corp.*, 613 F.2d 727, 743-744 (9th Cir. 1979) (rejecting monopolization claim based on design changes where evidence showed cost and performance improvement); *Response of Carolina, Inc.* v. *Leasco Response, Inc.*, 537 F.2d 1307, 1330 (5th Cir. 1976) (rejecting tie-in claim because of absence of evidence that new technology was designed for the purpose of tying two products); *Transamerica Computer Co.* v. *IBM Corp.*, 481 F. Supp. 965, 1002-1008 (N.D. Cal. 1979), aff'd, 698 F.2d 1377 (9th Cir. 1983) (design changes that were improvements (or de minimis) did not constitute monopolization; design change whose only purpose was to preclude competitors was unreasonably restrictive of competition); *ILC Peripherals Leasing Corp.* v. *IBM Corp.*, 458 F. Supp. 423, 438-444 (N.D. Cal. 1978), aff'd, 636 F.2d 1188 (9th Cir. 1980) (per curiam) (engineering changes were innovations or arguable innovations; no monopolization or attempted monopolization); *Telex Corp.* v. *IBM Corp.*, 367 F. Supp. 258, 347 (N.D. Okla. 1973), aff'd in part and rev'd in part on other grounds, 510 F.2d 894

And as the court of appeals recognized, there is no economic justification for petitioner's proposed penalty on the introduction of groups of technologically related new products. The development of new products, including groups of related new products, is the essence of competition, for it initially gives consumers a wider choice and stimulates competitors to produce improved and diverse products. To be sure, until the competitors have made their response in the market the innovator may reap a premium for his product or products. But firms have an incentive to innovate precisely because they expect to capitalize on the lag between introduction of their product and their rivals' marketing of worthy competing products, and the premiums earned are the rewards for successful innovation.[6]

b. It is unclear whether petitioner also seeks review of the court of appeals' rejection of its claims that Kodak violated Section 2 of the Sherman Act by making the 110 system incompatible with existing

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(10th Cir. 1975) (integration of additional computer function into product does not constitute illegal tie-in).

Several courts have recognized that their role must be limited in evaluating claims that technological changes are anticompetitive, to avoid becoming enmeshed in unanswerable technical questions about the justifiability of product innovation. *Response of Carolina, Inc.*, 537 F.2d at 1330; *Telex Corp.* v. *IBM Corp.*, 367 F. Supp. at 347; *ILC Peripherals Leasing Corp.* v. *IBM Corp.*, 458 F. Supp. at 439, 441.

[6] As we noted in our brief (Gov't Br. at 21-28, *Jefferson Parish Hospital District No. 2* v. *Hyde*, No. 82-1031 (argued Nov. 2, 1983)), there is in fact only a narrow range of conditions under which tie-ins are likely to produce anticompetitive effects. It would be ironic to brand the introduction of a group of new products as a tie-in, and per se illegal, when it falls so far outside that narrow range.

photographic and photofinishing products and by delaying its introduction. Compare Pet. 10-13 with Pet. App. A14-A16. In any event, as we have pointed out above there is no authority in *Berkey* or elsewhere for petitioner's apparent proposition that a major technological innovation by a firm with market power in itself violates Section 2. Similarly, as the Second Circuit noted in *Berkey*, even a monopolist can generally bring its products to market whenever it chooses; there must be additional anticompetitive "associated conduct" to constitute a Section 2 violation. 603 F.2d at 286 n.30. Here no such associated conduct is alleged; rather, petitioner merely complains that Kodak introduced new products when the sales of its existing products lagged.

2.a. The court of appeals also properly rejected petitioner's claim that Kodak violated Section 2(e) of the Robinson-Patman Act by discriminatory delay in delivery of photofinishing equipment and by refusing to supply technical services for adapting petitioner's plant to the new 110 system (Pet. App. E11-E12, A18-A20). Section 2(e) by its terms applies only to "a commodity bought for resale." 15 U.S.C. 13(e). Since petitioner never alleged that it bought for resale the photofinishing equipment which is at the heart of the complaint (Pet. 13), the court of appeals rightly held that no violation had been alleged.

Nor is there any basis for petitioner's contention that the Act reaches the delivery of equipment, because the equipment is used in operations involving chemicals and paper that are resold in reprocessed form as finished photographic prints (Pet. 13-14). Section 2(e) is directed at cooperative promotional or merchandising arrangements in connection with resale of the supplier's product, not at delivery of capi-

tal equipment that is not resold, nor at technical services. It therefore does not reach technical services relating to photofinishing equipment that is not resold. See *P. Lorillard Co.* v. *FTC*, 267 F.2d 439 (3d Cir.), cert. denied, 361 U.S. 923 (1959); FTC, *Guidelines for Advertising Allowances and Other Merchandising Payments and Services* (1969), *reprinted in* 5 J. Von Kalinowski, *Antitrust Laws and Trade Regulation* § 35.02, at 35-5 (1983); F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 376-381 (1962 & Supp. 1964); *Sano Petroleum Corp.* v. *American Oil Co.*, 187 F. Supp. 345, 356 (E.D.N.Y. 1960).

b. The court of appeals also rightly held (Pet. App. A20-A22) that petitioner had failed to state a claim for unlawful price discrimination under Section 2(a) of the Robinson-Patman Act. Petitioner alleged that Kodak allowed it a 12% price reduction on photographic paper only if it accepted and simultaneously paid for a six-month supply, while its competitors, who got the same 12% reduction, could take delivery and pay in six monthly installments (Pet. App. E20-E21).[7] This alleges only a difference in credit terms, under which petitioner's rivals had the use of some of their money for a longer period of time than did petitioner. Except in extreme circumstances, however, courts generally have not found price discrimination solely as a result of different credit terms. *Craig* v. *Sun Oil Co.*, 515 F.2d 221, 224 (10th Cir. 1975), cert. denied, 429 U.S. 829 (1976) (no dis-

[7] Petitioner argued in the court of appeals (see also Pet. 15) that its complaint alleged simply that its competitors were offered 12% price reduction, while it was not. This appears to be a post hoc amendment of its complaint. See Pet. App. B6, E21.

crimination in difference in credit terms); *Petroleum for Contractors, Inc.* v. *Mobil Oil Corp.*, 493 F. Supp. 320, 326-328 (S.D.N.Y. 1980) (collecting cases).[8] Here petitioner failed to allege that the difference in credit terms was not based on valid business considerations, and the slight difference in credit alleged was correctly held not actionable.[9]

As the court below noted (Pet. App. A21-A22), petitioner failed to allege, as required by the statute, that the discrimination had the effect of substantially lessening competition. See 15 U.S.C. 13(a). While substantial price discrimination over time can establish a prima facie case of injury to competition (*FTC* v. *Morton Salt Co.*, 334 U.S. 37, 46, 50-51 (1948)), petitioner did not expressly claim, nor can one otherwise conclude from the complaint, that the slight difference in credit terms alleged here—which related to only one ingredient in the price of the finished product—was "substantial" and would substantially lessen competition.

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[8] This Court, however, has pointed out in a Sherman Act price-fixing context that "credit terms * * * [are] an inseparable part of the price." *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643, 648 (1980) (footnote omitted).

[9] Petitioner presumably would get some benefit from having a six-month supply of paper, and thus not being subject to the possible uncertainties of monthly delivery. Petitioner's claim, however, apparently is that other customers were given an additional option denied to petitioner.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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